83-1056

No. 83-

IN THE

Supreme Court of the United States

October Term, 1983

GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD
OF EQUALIZATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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QUESTION PRESENTED

Whether, under the Contract, Due Process and Taking Clauses, a state may impair its own obligations under a financial contract, which has been fully and irrevocably performed by the other party to the contract, through a retroactive application of an unforeshadowed state Attorney General's opinion and state court decision.

PARTIES INVOLVED

The petitioner herein, plaintiff-appellant below, is General Motors Corporation, a publicly held company.* An additional plaintiff in the District Court of Oklahoma County was the Oklahoma Industries Authority, an agency of the State of Oklahoma.

Defendants-appellees below were the Oklahoma County Board of Equalization, George Keyes, County Assessor of Oklahoma County, and Joe B. Barnes, County Treasurer of Oklahoma County. Defendant-intervenor, appellee below, was Jan Eric Cartwright, Attorney General of the State of Oklahoma.

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* All of petitioner's United States and Canadian subsidiaries are wholly owned except Motor Enterprises, Inc. which is owned in part by the United States Small Business Administration.

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Oklahoma entered in these proceedings on May 17, 1983, as amended on July 26, 1983, and October 4, 1983.

OPINIONS BELOW

The opinion of the Supreme Court of Oklahoma is in three parts. The first order and opinion is reported unofficially at 54 Okla. B.J. 1351, and is reproduced in the Appendix hereto, at pp. A1-A8. A second order granting rehearing and amending the court's opinion is reported at 54 Okla. B.J. 2068, and is reproduced in the Appendix at pp. A9-A12. A supplemental opinion on rehearing and order denying further rehearing are reported at 54 Okla. B.J. 2564, and are reproduced in the Appendix A at pp. A13-A20 and A25.

The opinion of the trial court is unreported, and is reproduced in the Appendix at pp. A21-A23. The opinion of the Oklahoma County Board of Equalization is unreported and is reproduced in the Appendix at p. A24.

JURISDICTION

The final order of the Supreme Court of Oklahoma denying further rehearing in this case was entered on October 4, 1983, and is reproduced in the Appendix at p. A25. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 10, Clause 1, of the United States Constitution provides, in part:

> No State shall . . . pass any . . . Law impairing the Obligations of Contracts. . .

Amendment V of the United Sates Constitution provides, in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1, of the United States Constitution provides, in part:

> No State shall . . . deprive any person of . . . property, without due process of law. . . .

STATEMENT

In 1976, petitioner was considering a number of sites for the location of a major new automobile assembly plant. After narrowing its choice to sites in three different states, including Oklahoma, petitioner held intensive discussions with officials in each of those states. Oklahoma, which was then concerned with high unemployment and noncompetitive wage scales, aggressively sought to induce petitioner to locate its new plant in Oklahoma. Other states had already offered petitioner abatement of property

taxes on the new plant as an inducement to locate the plant in their states. Petitioner advised Oklahoma that petitioner's plant would not be located in Oklahoma unless Oklahoma provided a tax abatement competitive with other states under consideration.

In early 1977, petitioner and the State of Oklahoma agreed that petitioner would build and operate its new automobile assembly plant in Oklahoma City and, in return, Oklahoma would exempt the plant from *ad valorem* property taxes for twenty years. Under the agreement, petitioner would provide all but $1 million of the $288 million required to build the plant. A state agency, the Oklahoma Industries Authority (OIA),[1] would provide $1 million in bond financing for the plant. The OIA would hold legal title to the plant in order to qualify the plant for tax exemption under Article 10, § 6, of the Oklahoma Constitution, which provides that,

> all property of the United States, and of this State, and of counties and of municipalities of this State . . . shall be exempt from taxation. . . .

The OIA would lease the plant to petitioner for twenty years. After twenty years, petitioner would buy the plant from the OIA for a nominal sum.

In entering into and performing its contract with Oklahoma, petitioner relied upon twenty-five years of Oklahoma practice and legal precedent and upon assurances offered by the state's highest officials concerning the tax abatement. On October 4, 1976, petitioner met with the Attorney General, a representative of the Governor, two of the three members of the Oklahoma Tax Com-

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[1] The OIA is a public trust established under Oklahoma's Trusts for the Furtherance of Public Functions Act ("Public Trusts Act"), 60 Okla. Stat. §§ 176, *et seq.* The Public Trusts Act was enacted in 1951 to encourage new economic development in Oklahoma.

mission, and the Legal Counsel and Assistant General Manager of the OIA. At that meeting, all of these officials assured petitioner that, under Oklahoma law, the plant was, and would continue to be, exempt from Oklahoma taxes as long as title to the plant was held by the OIA.

These assurances were backed up by legal precedents and twenty-five years of uniform practice and understanding concerning the operation and legal effect of leases with state agencies pursuant to the Public Trusts Act.[2] In 1969, eight years before petitioner entered into its contract with Oklahoma, Hon. G. T. Blankenship, the Attorney General of Oklahoma, issued an official opinion advising that properties were tax exempt if a public trust held legal title:

> Assuming that the Oklahoma Industrial [sic] Authority has been in all respects created in strict accordance with 60 O.S. 1961, Sections 176 and 177; that the title to the project will vest in the Authority; and that the beneficial interest in the trust estate has been acquired on behalf of Oklahoma County, it is the opinion of the Attorney General . . . that no part of any property owned by the Authority will be, under the existing law, subject to ad valorem taxation by the State of Oklahoma, County of Oklahoma, Oklahoma City, or any other agency or instrumentality of the State of Oklahoma.

Okla. Attorney General Opinion No. 69-156. In Oklahoma, unlike most other states, opinions of the Attorney General are binding, not merely advisory. They "prescribe substantive law" and they have "general applicability." *Grand*

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[2] Between 1951, when the Public Trusts Act was adopted, and 1979, more than 340 industries and businesses came into or expanded their activities in Oklahoma through public trust financing. Inventory of Tax Exempt Industries in Commercial Real Property, Oklahoma Tax Commission, July 2, 1979.

River Dam Authority v. State, 645 P.2d 1011, 1014-1015 (Okla. 1982).

In October 1976, petitioner requested from a successor Oklahoma Attorney General a letter opinion stating that official Attorney General Opinion No. 69-156 as it would apply to the new plant remained the law of Oklahoma. In his letter to petitioner of October 5, 1976, Attorney General Larry Derryberry wrote:

> I have reviewed said opinion and find the conclusion reached to be a correct analysis of the law in Oklahoma. Since the date of issue of said opinion, I have found no case decisions or legislation that would alter the conclusion reached therein.
>
> Accordingly, it is my opinion that the state of the law expressed in Opinion No. 69-156 is still in force and effect.

Letter of Attorney General Derryberry, October 5, 1976, App. at p. A-26.

By 1976, although the Oklahoma Supreme Court had not ruled squarely on the question of the validity of tax arrangements such as the one petitioner later entered into, it had issued a number of decisions which supported their validity. In *Sublett v. City of Tulsa*, 405 P.2d 185 (1965), the Oklahoma court held:

> Where the Constitution and State law exempt all property of municipal corporations within the State from taxation, such property is exempt therefrom without regard to the character of the use, and the fact that certain property may be used by private corporations does not abrogate Const., Art. X, Sec. 5.

405 P.2d at 188. *See also Board of County Commissioners v. Warram*, 285 P.2d 1034, 1035 (Okla. 1955) ("Trusts with one or more governmental entities as beneficiary are

exempt from all forms of taxation in Oklahoma"); *State ex. rel. City of Tulsa v. Mayes*, 174 Okla. 286, 51 P.2d 266 (1935).

After entering into its agreement with Oklahoma, petitioner proceeded to construct the plant.[3] Legal title to the plant was vested in the OIA and petitioner entered into a twenty-year lease with the OIA. The lease agreement between petitioner and the OIA stated:

> The parties recognize that as the Lessor is an agency of the State of Oklahoma, the Project here demised is not subject to ad valorem taxation under the Constitution and laws of the State of Oklahoma. . . .

Lease Agreement, ¶ 13(d), April 1, 1978, App. pp. A27-A28.

The first hint that the plant might not be exempt from Oklahoma taxes came on July 31, 1979, three months *after* construction of the plant and petitioner's performance under the agreement were completed. A newly elected Attorney General issued an opinion withdrawing Attorney General Opinion No. 69-156 and ruling that public trust properties were taxable. Okla. Attorney General Opinion No. 79-168. Based on this new opinion, respondent County Assessor of Oklahoma County sent to petitioner on January 20, 1980, a notice changing the assessed valuation of the plant from zero in 1979 to the full value of the plant in 1980 with a resultant tax liability in excess of three million dollars per year. Shortly thereafter, in a test case drawn from a large number of cases filed in the wake of the Attorney General's opinion, the Oklahoma Supreme Court,

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[3] The plant comprises approximately 70 acres under roof and was, at the time of its completion, the largest such facility in the United States. Petitioner presently employs more than 5,000 persons at the plant.

in *State ex rel. Cartwright v. Dunbar*, 618 P.2d 900 (Okla. 1980), held that public trust properties were taxable, but on different grounds from those cited in Attorney General Opinion No. 79-168. The result in *Dunbar* was based on the court's conclusion that the industrial lessee, not the State agency which holds legal title, is the owner of public trust property and, hence, such property is not "property of the . . . State" within the meaning of the tax exemption provision of Article 10, § 6, of the Oklahoma Constitution.

The court's conclusion in this regard was completely unanticipated at the time the agreement between petitioner and Oklahoma was entered into. Indeed, in *Dunbar*, the court stated that "the Legislature was of the view that public trust property was constitutionally exempt from taxation" and the "first notice" to the contrary "was the July 31, 1979 opinion of the Attorney General." 618 P.2d at 913. Until that time, Oklahoma officials were bound by the 1969 opinion of the Attorney General. In Oklahoma, "it is the duty of public officers . . . to follow the opinion of the Attorney General until relieved of such duty by a court of competent jurisdiction or until this Court should hold otherwise." *Id.*

Based on Attorney General Opinion No. 79-168 and the decision of the Oklahoma Supreme Court in *Dunbar*, respondent Oklahoma County Board of Equalization denied petitioner's protest. Appendix at p. A24. Petitioner, along with the OIA, commenced this action by filing a Petition with the District Court of Oklahoma County. Petitioner and the OIA alleged, *inter alia*, that the assessment of taxes on the plant would violate the Contract Clause of the United States Constitution by impairing the obligation of petitioner's tax abatement agreement with the State of Oklahoma, and would violate the Due Process Clause of the Fourteenth Amendment by taking petitioner's

property without due process of law and without just compensation.[4]

In granting summary judgment for respondents, the Oklahoma trial court upheld the ruling of the Board of Equalization denying petitioner's protest. The court held that, under *Dunbar*, the plant was taxable and the agreement between petitioner and the State of Oklahoma was "void and contrary to law," Appendix at p. A-22. The trial court did not address the federal constitutional issues presented by petitioner and the OIA.

On appeal to the Oklahoma Supreme Court, petitioner again argued that, under the Contract and Due Process Clauses, the State of Oklahoma could not apply new rules of law retroactively to render unforceable petitioner's tax exemption contract, which had been entered into and fully performed by petitioner prior to any notice that such agreement was invalid. Appendix pp. A4-A5.

In reaching its decision, the Oklahoma Supreme Court assumed that petitioner and the State did in fact enter into a contract pursuant to which the Oklahoma City plant was to be exempt from property taxes for twenty years. Slip Op., May 17, 1983, at 6; Appendix at p. A7. The court below also expressly assumed that, in entering into that contract, petitioner and state officials did in fact rely upon the then established principle that such contracts were valid under Article 10, § 6, of the Oklahoma Consti-

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[4] In compliance with Rule 21.1(h), the pertinent allegations of the Petition filed with the trial court in which the federal questions were raised are reproduced in the Appendix hereto, at pp. A29-A31 and are summarized in the accompanying text. Petitioner's arguments to the Oklahoma Supreme Court respecting the federal questions are summarized in that Court's opinion of May 17, 1983 (Appendix pp. A4-A5) and at p. 8 above. The disposition of the federal questions by the trial court and the Supreme Court of Oklahoma are summarized in the accompanying text at pp. 8-9 and are found in the opinions of those courts reproduced at Appendix pp. A1-A23.

tution, as set out in Oklahoma Attorney General Opinion No. 69-156. *Id.* Nevertheless, the Oklahoma Supreme Court upheld the trial court and refused to enforce the State's obligation under its contract with petitioner. The Oklahoma court held that the Contract Clause does not protect contracts which are invalid or illegal, relying heavily on discredited language from this Court's decision in *Norton v. Shelby County,* 118 U.S. 425, 442 (1886), to the effect that "[a]n unconstitutional statute confers no rights, creates no liability, and affords no protection." *Id.* The court below further held that petitioner could not rely on the assumed authority of Oklahoma officials or even of the state legislature. Slip Op., May 17, 1983, at 7; Appendix at p. A8. On rehearing, the court indicated that petitioner should have filed an application for a declaratory judgment instead of relying on Oklahoma officials. Supplemental Opinion on Rehearing, October 4, 1983, at 4; Appendix at pp. A16-A17.

REASONS FOR GRANTING THE WRIT

If, in the factual circumstances presented here, the Oklahoma legislature had passed a statute retroactively declaring petitioner's tax abatement contract void and forbidding state officers to perform the contract, there would be no doubt that the state had violated the Contract and Due Process Clauses of the United States Constitution. *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978); *United States Trust Co. of New York v. New Jersey,* 431 U.S. 1 (1977); *Nichols v. Coolidge,* 274 U.S. 531 (1927). The important federal question presented by this case is whether the same state action, when effected by retroactive executive and judicial rulemaking, is also subject to federal constitutional scrutiny. The preponderance of this Court's past decisions, including its most recent opinions, support an affirmative answer and a judgment vindicating petitioner's contract rights. However, there

are several inconsistent authorities which can be cited to the contrary and which indicate that this important question should now be settled by this Court.

I. Decisions Of This Court Support The Proposition That The Contract, Due Process, And Taking Clauses Limit The Circumstances In Which A State May, By Retroactive Executive Or Judicial Action, Impair Its Own Obligation Under A Financial Contract.

A. Decisions Directly Addressing Changes of Law By State Courts

While no recent majority opinion of the Court has squarely addressed the question presented here, earlier rulings establish that the Contract, Due Process, and Taking Clauses proscribe the result reached by the court below. In addition, Justice Stewart addressed the question persuasively in a 1967 concurring opinion which bears directly on this case.

In *Gelpcke v. City of Dubuque*, 1 Wall. 175 (1863), a case involving the validity of city bonds, this Court held that

> "The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law." [*quoting* Ohio Life & Trust Co. v. Debolt, 16 How., 427, 432 (1853.)]
>
> The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this Court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal.

1 Wall. at 206; *accord, Havemeyer v. Iowa County,* 3 Wall. 294 (1876).

Later, in *Muhlker v. New York and Harlem R.R. Co.,* 197 U.S. 544 (1905), this Court prohibited the taking of property through a state judicial decision which destroyed the property right by overruling prior decisions establishing that right. This Court stated:

> When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.
>
> And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it.

197 U.S. at 570.

The most recent learning from this Court on the issue came in the concurring opinion of Justice Stewart in *Hughes v. Washington,* 389 U.S. 290 (1967). In *Hughes,* the State of Washington claimed ownership of land that had been deposited by the ocean on adjoining upland property conveyed by the United States prior to the date Washington became a state. This Court determined that the issue of ownership was controlled by federal law. Justice Stewart, however, believed that the issue was controlled by state law but that the state court's most recent construction of state law on the issue "effected an unforeseeable change in Washington property law as expounded

by the State Supreme Court." 389 U.S. at 297 (Stewart, J., concurring). Thus, Justice Stewart concluded that the state court decision constituted a taking of property without just compensation. According to Justice Stewart:

> To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Id. at 296-97.

B. Recent Decisions Affording Protection Against Unjustified Retroactive Changes In Law

In a series of recent decisions, this Court has developed a doctrine of nonretroactivity to be applied in cases where unanticipated federal judicial rulings would upset well-founded reliance interests. *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 103 S. Ct. 3492 (1983); *Hill v. Stone*, 421 U.S. 289 (1975); *Lemon v. Kurtzman*, 411 U.S. 192 (1973); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969). In another recent case, this Court applied the Due Process and Taking Clauses of the Fifth Amendment to invalidate federal executive and judicial action which nullified without compensation reasonable investment-backed expectancies which this Court found to constitute a property right. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). These two lines of authority support a conclusion that the federal constitution limits state impairments of contractual obliga-

tions through retroactive executive and judicial rule-making.

In the cases developing a doctrine of nonretroactivity for unanticipated federal judicial rulings, this Court has recognized the "fact of legal life" that judges, as well as state legislatures, make law[5] and that "*even judge-made rules of law* are hard facts on which people must rely in making decisions and in shaping their conduct." *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973) (emphasis supplied). In *Lemon*, this Court *abandoned* the principle of *Norton v. Shelby County*, 118 U.S. 425 (1886), relied on by the court below, that an unconstitutional statute "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." 118 U.S. at 442. Thus, when this Court determines whether to apply a constitutional decision retroactively, it now engages in a "process of reconciling the constitutional interests reflected

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[5] Under Oklahoma law, the actions of the state's Attorney General and tax officials impairing the obligation of petitioner's contract were legislative in character and effect. Opinions of the Attorney General of Oklahoma "prescribe substantive law" of "'general applicability'" and "have the force and effect of a 'rule'" which other public officials, such as respondent tax authorities, are under a duty to obey. *Grand River Dam Authority v. State*, 645 P.2d 1011, 1014-1015, 1016 (Okla. 1982). The legislative character of the assessment functions of state tax officials also has been recognized by the Oklahoma Supreme Court, holding "that the valuation of property for purposes of taxation is an incident to the taxing power, which is vested in the legislative power of this state." *In re Assessment of Kansas City Southern Ry. Co.*, 168 Okla. 495, 33 P.2d 772, 780 (1934); *see also State ex rel. Poulos v. Board of Equalization*, 646 P.2d 1269, 1275 (Okla. 1982) (Simms, J. dissenting) (functions of Board of Equalization are legislative).

By the same token, a state court's declaration of a new, unanticipated rule, through the limitation of its own prior holdings and the contradiction of previously well-established executive and legislative constructions, amounts to the creation of new law which is legislative in character and effect.

in a new rule of law with reliance interests founded upon the old." *Lemon, supra,* 411 U.S. at 198; *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971).[6] Implicit in this process is a recognition by this Court that these reliance interests can themselves reach constitutional proportions in some instances, and that due process sometimes might be denied if these reliance interests simply were swept away with the old rule of law.

In *Kaiser Aetna v. United States, supra,* this Court invoked the Due Process and Taking Clauses to prevent a taking without compensation which the federal government sought to accomplish through administrative action and judicial enforcement of purported statutory authority. 444 U.S. at 168-69. The federal government asserted a navigational servitude to permit free public access to a pond, Kuapa Pond, after Kaiser Aetna had invested millions of dollars in improvements based on the reasonable expectation that the pond was private property. Kaiser Aetna was thereby prevented from contracting with customers to charge an annual access fee. This Court held that Kaiser Aetna had "expectancies embodied in the concept of 'property' – expectancies that, if sufficiently important, the Government must condemn and pay for before it takes . . ." (444 U.S. at 179) because "Kuapa Pond has always been considered to be private property under Hawaiian law." *Id.* In an even more recent case, *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, ..., 102 S. Ct. 3164, 3171 (1982), this Court noted that "the degree of interference with investment-backed expectations is of particular significance" to a deter-

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[6] In *Chevron,* this Court articulated a three-part test, which has been followed in the subsequent cases, to determine when the doctrine of nonretroactivity will apply: (1) whether the new decision is a clear break from prior law which was not foreshadowed; (2) whether retroactive effect is necessary for the operation of the new principles announced; and (3) whether substantial inequity would result from a retroactive application. 404 U.S. at 106-108.

mination whether there has been a violation of the Due Process Clause of the Fourteenth Amendment.

C. Restitution Principles

This is also the type of case in which this Court has previously recognized the existence of a right to restitution. Under the view most favorable to the state of Oklahoma there was a contract which failed because of a new and unforeshadowed rule of law, after petitioner had provided its consideration in full. In such circumstances, Oklahoma has been unjustly enriched if it does not (a) meet its obligation under the contract, or (b) restore the consideration it has received as a result of the mistake. *See* RESTATEMENT OF THE LAW, RESTITUTION § § 47-49 (1937). Here, there is no feasible way to restore the consideration. Thus petitioner retains a right to restitution. In *Louisiana v. Wood*, 102 U.S. 294 (1880), this Court held that the purchaser of unauthorized and invalid municipal bonds was entitled to restitution of his investment, with interest, stating that "[i]t would certainly be wrong to permit the city to repudiate the bonds and keep the money borrowed on their credit" where "[t]he consideration on which the payment was made has failed, because the bonds were not, in fact, valid obligations of the city." 102 U.S. at 298-299. The Court below failed to allow any restitutionary recovery to compensate for the destruction of petitioner's contract and property rights. Oklahoma therefore took petitioner's property without providing just compensation and thereby violated the Due Process and Taking Clauses.

II. Cases Failing To Apply A Federal Constitutional Limit On The Retroactivity Of State Executive And Judicial Rulemaking Are Distinguishable.

Two decisions of this Court constitute the primary authority for the assertion that the federal constitution does not limit retroactive rulemaking by state executive and judicial officers. They are *Tidal Oil Co. v. Flanagan*,

263 U.S. 444 (1924), and *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932).

In *Tidal Oil Co., supra,* this Court held that "the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law." 263 U.S. at 450. In *Sunburst Oil & Refining Co., supra,* Justice Cardozo declared, in writing for the Court:

> We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.

287 U.S. at 364.

Both *Tidal Oil* and *Sunburst* are clearly distinguishable from this case. Neither involved a state's repudiation of its own obligations under a contract of a financial nature, a situation which this Court has recently stated calls for "particular scrutiny" (*Allied Structural Steel Co. v. Spannaus, supra,* 438 U.S. at 244) and in which "complete deference . . . is not appropriate because the State's self-interest is at stake." *United States Trust Co. of New York v. New Jersey, supra,* 431 U.S. at 26.

Neither *Tidal Oil* nor *Sunburst* involved a complete repudiation of one contracting party's obligation after full performance had been rendered by the other party, the situation presented by this case in which petitioner has fully performed and the State of Oklahoma has performed hardly at all. Nor were the affected parties in *Tidal Oil* and *Sunburst* deprived of consideration for substantial and irrevocable investments made in reasonable reliance upon long-standing state practice and legal precedent and assurances of the highest state officials. [7]

[7] Recent decisions by two state courts in cases involving public contracts are similarly distinguishable. *See Chemical Bank v. Washington Public Power Supply System,* 666 P.2d 329 (Wash. 1983); *Asson v. City of Burley,* 670 P.2d 839, (Idaho 1983).

Tidal Oil in particular rests upon an outmoded view of the law which holds that judges do not make new law but simply declare what the law has always been. This Court has clearly rejected that view in its recent cases dealing with the retroactivity of federal judicial rulings. *See pp.* 12-14 *supra.* Moreover, in one of those recent cases, *Lemon v. Kurtzman,* this Court indicated that, despite Justice Cardozo's *dictum* in *Sunburst,* federal constitutional interests cannot be ignored when considering the retroactive application of an unanticipated judicial decision. 411 U.S. at 200 n.2.

III. The Extraordinary Circumstances Present In This Case Provide A Proper Line Of Demarcation Between Permissible And Impermissible Retroactive Rulemaking By State Executive And Judicial Officers.

Decisions of this Court supporting the proposition that the federal constitution imposes limits on the circumstances in which a state may impair the obligation of contracts by retroactive executive or judicial rulemaking also suggest those circumstances where constitutional protection is appropriate. Specifically, those decisions establish that a state may not so impair the obligations of a contract when the extraordinary facts present in this case are shown to exist:

1) the obligation the state has impaired is that of the state itself (*Allied Structural Steel Co., supra; United States Trust Co. of New York, supra*);

2) the state's contract is of a financial nature (*United States Trust Co. of New York, supra*);

3) the other party to the contract has made a substantial and irrevocable change in position in reasonable reliance upon long-standing state practice and precedent and the assurances of authoritative

state officials (*Kaiser Aetna, supra; Lemon, supra; Chevron Oil Co., supra; Muhlker, supra; Gelpcke, supra*);

4) the other party to the contract has fully performed (*Lemon, supra; Chevron Oil Co., supra; Gelpcke, supra*);

5) the executive or judicial decision sought to be retroactively applied represented a clear break from prior law and was not foreshadowed (*Kaiser Aetna, supra; Lemon, supra; Chevron Oil Co., supra; Hughes, supra* (Stewart, J., concurring)); and

6) retroactive effect is not necessary for the operation of the new principles announced in the unanticipated decision (*Chevron Oil Co., supra*).

These circumstances and this case in particular afford this Court the clear opportunity to adopt Justice Stewart's conclusion in *Hughes, supra,* that "the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature. . . ." 389 U.S. at 298.

IV. The Decision Below Creates Great Uncertainty Concerning The Enforceability Of Financial Contracts To Which A State Is A Party.

The decision below permits a state to accomplish through its executive and judicial branches what it could not constitutionally do through its legislature: the repudiation of the state's obligations under a contract after the state has received the benefits of full performance by the other party to the contract. Such a result completely undermines the general purpose of the Contract Clause: "to en-

courage trade and credit by promoting confidence in the stability of contractual obligations." *United States Trust Co. of New York, supra,* 431 U.S. at 15.

If the decision below is allowed to stand, it will seriously disrupt contractual relations between private parties and state governments not just in Oklahoma, but throughout the country. Henceforth, no private party will be able to enter into a contract with a state without running the risk that, after the private party's performance is completed, state officials will find a way to repudiate their part of the bargain. Private parties will no longer be able to rely on state court decisions, Attorney General opinions, or state administrative practice upholding the authority of state officials to enter into a particular agreement, no matter how strong the precedent or long-lasting the practice.

The risk of repudiation will be greatest when the agreement in question involves financial obligations of state governments. As this Court has pointed out, "[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *United States Trust Co., supra,* 431 U.S. at 26. With state and local governments searching for sources of increased revenues, the political pressure will be great to repudiate tax abatement agreements that have been reached with businesses. State judges often are no more immune from such political pressures than are state legislators and executives.

The existence of the risk that a state may not be relied upon to fulfill its part of a financial bargain could lead to increased costs for states when they enter into financial contracts with private parties. Oklahoma will

have to pay a premium for putting itself in position to break its contracts. States that have no intention of repudiating their contracts through administrative or judicial action may also be penalized. These states will have to pay the same premium as Oklahoma since, unless the decision below is reversed, the risk will remain that any state can simply walk away from its financial commitments by making a bargain, accepting its fruits, and then changing the rules of the game.

The Oklahoma court suggested in its decision that, if petitioner wanted to be sure that its tax exemption agreement with the state was lawful, petitioner should have filed a declaratory judgment action. Such a suggestion is completely unrealistic, reflects poor public policy and is, in fact, unauthorized where an actual controversy does not exist. If a private party had to file a declaratory judgment action every time it entered into a contract with a state in order to ensure that the state had the authority to enter into such a contract, the courts would be clogged with such actions – most of which would be unnecessary and wasteful – and states would be unable to render vital services in a timely and efficient manner. Moreover, even if a favorable declaratory judgment were obtained from a lower court, review by the state's highest court would always be required in order to prevent a subsequent retroactive taking of contract rights by that court.

Under the decision below, state officials and private parties must either refuse to act until "there has been an authoritative judicial determination that the governing legislation is constitutional . . . or risk draconian, retrospective decrees should the legislation fall." *Lemon v. Kurtzman*, 411 U.S. at 207. Even then, there remains the risk that a subsequent "authoritative judicial determination" could overturn the previous one. Such a situation "seriously undermine[s] the initiative of state legislators

and executive officials alike," 411 U.S. at 208, as well as the willingness of private parties to enter into agreements with those state officials.

The impact of the decision below will be widespread. Tax abatement agreements are common throughout the United States both at the state and local level. Tax abatement is a great equalizer available to depressed areas for improving their position by attracting new private investment and thus increasing the availability of jobs. Hundreds of businesses have made large capital investments in reliance on the validity of those agreements under state laws as the laws existed at the time the agreements were entered into. The decision below places each one of those agreements in jeopardy. This Court should review and reverse the decision below to assure these businesses that their tax abatements may not be taken away after substantial and irrevocable investments have been made in reliance on those agreements.

CONCLUSION

"A claim that a State statute impairs the obligation of contract is an appeal to the United States Constitution, and cannot be foreclosed by a State court's determination whether there was a contract or what were its obligations." *Atlantic Coast Line R. Co. v. Phillips*, 332 U.S. 168, 170 (1947). The scope of this constitutional protection and its applicability to petitioner's contract with Oklahoma are, in terms of the Contract, Due Process, and Taking Clauses, federal questions which should be resolved by this Court.

The petition for a writ of certiorari should be granted.

Respectively submitted,

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December 1983

APPENDIX

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

GENERAL MOTORS CORPORATION,
Appellant,
v.
OKLAHOMA COUNTY BOARD OF EQUALIZATION, GEORGE KEYES, COUNTY ASSESSOR OF OKLAHOMA COUNTY, and JOE B. BARNES, COUNTY TREASURER OF OKLAHOMA COUNTY,
Appellees,
and
JAN ERIC CARTWRIGHT, Attorney General of Oklahoma,
Defendant-Intervenor/Appellee.

No. 58,438

FOR PUBLICATION

• • • •

Appeal from the District Court, Oklahoma County, Oklahoma

HONORABLE JACK R. PARR, District Judge.

• • • •

George Keyes, County Assessor of Oklahoma County, issued to appellant, General Motors Corporation, a "Notice of Change of Assessed Valuation" on the General Motor's Assembly Plant located in Oklahoma City, Oklahoma.

General Motors filed a protest with the Oklahoma County Board of Equalization and it denied the protest.

General Motors appealed the denial of its protest to the District Court. The disputed taxes were paid under protest and General Motors filed suit for refund.

The District Court rendered summary judgment in favor of defendant public officials (appellees) and General Motors appealed.

• • • •

JUDGMENT AFFIRMED

• • • •

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IRWIN, J.:

The Oklahoma Industries Authority (OIA), a public trust, created pursuant to 60 O.S.1961, § 176 et seq., as amended, sponsored the "public trust" financing for the construction of General Motors Corporation's (GMC) assembly plant in Oklahoma City. The issue presented is whether GMC's interest (improvements, machinery and equipment) in the plant is subject to ad valorem taxation. GMC contends its interest is not taxable because of a tax abatement agreement between it and the State of Oklahoma. GMC asserts that public agencies and officials of the State of Oklahoma agreed that if GMC would build its assembly plant in Oklahoma that such plant would not be subject to ad valorem taxation for twenty years.

The trial court in rendering summary judgment against GMC found that Art. 10 § 5, of the Okl. Const. prohibits a contract which surrenders, suspends or contracts away the power of taxation, and although the existence of a contract is disputed, such contract, even if it could be established, would be void and contrary to law; and that the assembly plant is in possession of GMC under an executory contract of purchase and is taxable under *State ex rel. Cartwright v. Dunbar,* Okl. 618 P.2d 900 (1980).

Since the Legislature first authorized the creation of public trusts as a vehicle for "public trust" financing in 1951, numerous facilities throughout the state have been constructed by private entities using such financing. *Dunbar* explains the method generally employed in Oklahoma and such method was used in financing part of the construction of GMC's assembly plant. Here, a lease contract and bond indenture were entered into between the public trust (OIA) and GMC. OIA issued bonds to help pay for part of the construction costs of the facility. GMC paid all additional construction costs. OIA holds legal title to

the property. GMC's lease payments to OIA are sufficient to amortize the bond issue and other costs. GMC will "purchase" the entire project for $1,000 when the bonded indebtedness is satisfied.

In *Dunbar* we held that the trust properties in which private entities hold a possessory and contractual interest by virtue of a lease agreement with a public trust as holder of legal title was subject to ad valorem taxation. *Dunbar* was bottomed on the theory that the Dunbar lease agreement was nothing more or less than an executory contract of sale and that property of a public trust held under a sale-purchase executory contract is not constitutionally tax exempt. GMC concedes that its assembly plant would be taxable under *Dunbar* but for the tax abatement agreement.

GMC says that the characterization of its agreement with OIA as a "lease" or "executory contract" is not of consequence as GMC understands its tax abatement agr e-ment with Oklahoma. GMC states the substance of the agreement and this lawsuit is that Oklahoma agreed to a tax abatement for the assembly plant in return for GMC constructing the plant in Oklahoma. GMC says that it has fulfilled its part of the agreement.

GMC contends that the agreement was lawful when made and any state action which impairs the obligation of that agreement violates Art. 1, § 10, of the United States Constitution. GMC argues the Legislature in the Public Trust Act classified industrial property for tax purposes pursuant to Art. 10, § 22, of the Okl. Const., to improve economic activity and to create jobs in Oklahoma; that OIA, a state agency which was created pursuant to the Act, bargained with GMC for the tax abatement; and the negotiations and contracts of OIA constitute the negotiations and contracts of the State of Oklahoma. GMC also submits that the Attorney General's opinion (69-156) rendered in 1969, in which he expressed the view that

public trust properties were not subject to ad valorem taxation was incorporated into and became a part of the tax abatement agreement between OIA and the State.

Closely related to GMC's argument that the imposition of the ad valorem taxes impairs the obligations of its tax abatement agreement is its assertion that it has been denied due process. GMC argues that the Fifth Amendment through the Fourteenth Amendment of the Federal Constitution forbids the taking of property without just compensation and that its tax abatement agreement is a property right. GMC says that both contract and property rights arising from its tax abatement agreement are protected by the Due Process Clause as well as by the Impairment of Contract Clause.

In *Dunbar* we considered the constitutionality of 60 O.S.1981, § 178.7 enacted in 1977. That enactment authorized a tax exemption for a period of years of all interests in public trust property, but the lessee (GMC-here) of public trust property was required to pay an annual sum in lieu of ad valorem taxes for each year following the tenth anniversary date of the issuance of the revenue bonds.

In *Dunbar* we said that Art. 5, § 50, Okl. Const., prohibits the Legislature from exempting any property from taxation except as provided in the Constitution. We held that since other property similarly situated was statutorily taxable, any legislative attempt to delay the taxable status of a lessee's interest in public trust property would be in conflict with Art. 5, § 50, supra, and unconstitutional.

Art. 10, § 22, of the Constitution authorizes the Legislature to classify property for purposes of taxation; and the valuation of different classes by different means or methods. The Legislature has a wide range of discretion in classifying subjects of taxation, and to justify judicial interference, the classification must be based on an unreasonable or arbitrary classification. *Continental Oil*

Company v. Oklahoma State Board etc., Okl. 570 P.2d 315 (1977).

Although the property belonging to a public trust is exempt from taxation – Art. 10, § 6, Okl. Const. – the interest a lessee (GMC-here) has in public trust property is subject to ad valorem taxation. *Dunbar, supra.*

If the property here had not been "leased" from a public trust, it would have been taxed as all other property similar situated under our general statutory scheme of taxation. Any attempt, legislative or otherwise, to exempt property from taxation in the possession of a "lessee" under an executory contract of purchase where the record title to the property is in a public trust, and not exempt similar property where record title to the property is in a private entity instead of a public trust, would contravene Art. 10, § 22, supra.

In *Dunbar* we also held that the State was not estopped from assessing the "lessee's" property because of its reliance on the generally held view that such interest was exempt from taxation. Our holding was based on the principle that a state and its subdivision cannot be estopped from protecting public rights when public officials have acted erroneously or failed to act.

We will now consider the enforceability of the alleged tax abatement agreement. GMC did not introduce the agreement into the record but relied upon certain opinions of the Attorney General, statements of officials of the State of Oklahoma and of various civic organizations, correspondence and news releases, and representations made by officials of OIA. In its journal entry of judgment the trial court in referring to the agreement said "although its existence is in dispute, such contract, even if it could be established, would be void and contrary to law."

The lease agreement between GMC and OIA did not spell out the tax abatement agreement but it did mention ad valorem taxes. One sentence stated that the parties

recognized that as OIA is an agency of the state, the assembly plant was not subject to ad valorem taxation under the Constitution and laws of Oklahoma. However, the parties did agree that in the event the State of Oklahoma or any of its subdivisions shall demand the payment of any general or ad valorem tax that GMC would pay the tax.

We will assume, arguendo, that OIA, a state agency, entered into the tax abatement agreement with GMC; and that both parties relied upon the then current Attorney General's opinion which expressed the view that public trust properties were not subject to taxation.

Under general legal principles, public agents have no power to bind the state or any of its subdivisions by apparent authority in excess of their actual authority. "An unconstitutional act is not a law; it binds no one, and protects no one." *Little Rock, etc., Railway v. Worthen;* and *Huntington v. Worthen,* 120 U.S. 97, 30 L.Ed. 588, 7 S.Ct. 469. If the Legislature has not acted within the framework of the Constitution, it has not acted. An unconstitutional statute confers no rights, creates no liability, and affords no protection. *Norton v. Shelby County,* 118 U.S. 425, 30 L.Ed. 178, 6 S.Ct. 1121. In *Zane v. Hamilton County,* 189 U.S. 370, 47 L.Ed. 858, 23 S.Ct. 538, county bonds were issued pursuant to a statute which was later declared to be unconstitutional. The United States Supreme Court held that the bonds having been illegally issued, do not constitute a contract which is protected by the Federal Constitution. 16A Am.Jur.2d, *Constitutional Law,* § 688, states:

> "The Federal Constitution does not protect contracts which are invalid, illegal . . . That which is not an enforceable contract right is not an obligation which can be impaired within the meaning of the constitutional prohibition.
>
> The impairment of a contract cannot occur where the alleged contract is based on a proviso con-

tained in a void statute. A contract which rests on an unconstitutional statute is itself void and creates no obligation to be impaired by subsequent legislation."

The cases relied upon by GMC involve constitutional legislative enactments or valid contracts and it relies on the principle that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it," *United States ex rel. Hoffman v. The City of Quincy*, 71 U.S. 535, 18 L.Ed. 403 (1867), quoted in *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 78 L.Ed. 413, 54 S.Ct. 231, 88 A.L.R. 1481 (1934). This general statement of law cannot be disputed but it does not support GMC's position, because the purported tax abatement contract was not in accord with Oklahoma law at the time it was made.

We are concerned here with an alleged tax exemption that the Legislature could not constitutionally grant. Surely if the Legislature is without constitutional authority to grant a tax exemption, state agencies or officials of the state could not grant such exemption. The grantee of an exemption is chargeable with notice of our Constitution and the limitations of public officials, and he may not rely on assumed authority whether such authority is assumed by the Legislature or other public officials.

Our decision in *Dunbar* is controlling in the case at bar and GMC's property is subject to ad valorem taxation unless the alleged tax abatement agreement is enforceable. The Federal Constitution does not protect unenforceable contract rights. The alleged agreement is void because no public official or public agency could constitutionally grant the tax exemption contained in the agreement. Since such agreement is unenforceable, GMC is not entitled to the tax relief it sought.

JUDGMENT AFFIRMED.

ALL THE JUSTICES CONCUR.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

GENERAL MOTORS,
Appellant,
v.
OKLAHOMA COUNTY BOARD OF EQUALIZATION, GEORGE KEYES, COUNTY ASSESSOR OF OKLAHOMA COUNTY, and JOE B. BARNES, COUNTY TREASURER OF OKLAHOMA COUNTY,
Appellees,
and
JAN ERIC CARTWRIGHT, Attorney General of Oklahoma,
Defendant-Intervenor/Appellee.

No. 58,438

FOR PUBLICATION

ORDER

Rehearing granted. This Court's decision filed on May 17, 1983 is amended as follows:

Page 7 of the typewritten opinion is deleted and inserted in lieu thereof the following:

> The impairment of a contract cannot occur where the alleged contract is based on a proviso contained in a void statute. A contract which rests on an unconstitutional statute is itself void and creates no obligation to be impaired by subsequent legislation."

GMC argues that the rule in *Norton* has long been abandoned by both the federal and state courts and this abandonment is discussed in *Lemon v. Kurtzman*, 411 U.S. 192, 36 L.Ed. 151 (1973). In *Lemon*, non-public sectarian schools had performed services under a statute which was

subsequently declared unconstitutional. The issue was whether the schools were entitled to be reimbursed for services performed prior to the court's holding that the statute was unconstitutional. The Supreme Court held the schools were entitled to be reimbursed for such services.

The *Lemon* decision is bottomed upon the theory of reliance, i.e., the schools had performed the services under a statute that had not been declared unconstitutional and for nearly two years the State and the schools proceeded to act on the assumption that the schools would continue to perform the services and that payment for such services would be made. The Court noted that the significance of the school's reliance was reinforced by the fact that State withdrew its motion for a preliminary injunction to block certain payments and did not seek injunctive relief for the suspension of payments.

The Supreme Court in *Lemon*, discussing the broad discretionary powers of the trial court in shaping equity decrees, said:

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

This court in effect followed the reasoning set forth in *Lemon* when it first considered the taxability of public trust property held under an executory contract to purchase in *Dunbar*. Our decision in *Dunbar* was promulgated in January, 1980, and was prospective in reference to taxability. In discussing the retroactive application of that decision, we said:

> "In our opinion the 'equities in this case do not authorize retroactive application of our decision here-

in' (see *Ford, supra*) to any year preceding the 1980 tax year. Prior to the July 31, 1979, opinion of the Attorney General expressing the conclusion that such property was taxable, the taxing authorities had been following a former opinion of an Attorney General who had concluded the property was tax-exempt. Therefore, the interests of private entities in public trust property which are taxable under this decision shall be taxable beginning with the 1980 tax year, but no interests in any public trust property shall be considered or treated as 'omitted property' for any preceding year."

We are concerned here with an alleged tax exemption that the Legislature could not constitutionally grant. Surely if the Legislature is without constitutional authority to grant a tax exemption, state agencies or officials of the state could not grant such exemption. GMC was charged with notice of our Constitution and the limitations of public officials, and it may not rely on assumed authority whether such authority is assumed by the Legislature or other public officials. GMC was charged with notice of the authority of the Attorney General whose opinions may not supplant the courts. The Attorney General gives his opinion for public officials' guidance until the questions concerning them are decided by the courts. *Grand River Dam Authority v. State*, Okl., 645 P.2d 1011 (1982). GMC may not invoke this proceeding the "reliance interest" discussed in *Lemon*.

The cases relied upon by GMC involve constitutional legislative enactments or valid contracts and it relies on the principle that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it," *United States ex rel. Hoffman v. The City of Quincy*, 71 U.S. 535, 18 L.Ed. 403 (1867), quoted in *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 78 L.Ed. 413, 54 S.Ct. 231, 88 A.L.R. 1481 (1934). This general statement

of law cannot be disputed but it does not support GMC's position, because the purported tax abatement contract was not in accord with Oklahoma law at the time it was made.

Our decision in *Dunbar* is controlling in the case at bar and GMC's property is subject to ad valorem taxation unless the disputed tax abatement agreement is legally enforceable. The Federal Constitution does not protect unenforceable contract rights. The disputed agreement, even if it could be established, is void because no public official or public agency could constitutionally grant the tax exemption allegedly contained in the agreement. Since the alleged agreement is unenforceable, GMC is not entitled to the tax relief it sought.

In view of our decision here, we find it unnecessary to consider the force and effect of Art. 10, § 5 of our Constitution which prohibits the surrender of the power of taxation and requires taxes to be uniform upon the same class of subjects and the Fourteenth Amendment to the U. S. Constitution.

JUDGMENT AFFIRMED.

AMENDMENT DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 21st day of July, 1983.

s/ DON BARNES
CHIEF JUSTICE

ALL THE JUSTICES CONCUR.

FOR OFFICIAL PUBLICATION

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

GENERAL MOTORS CORPORATION,
Appellant,
v.
OKLAHOMA COUNTY BOARD OF EQUALIZATION, GEORGE KEYES, COUNTY ASSESSOR OF OKLAHOMA COUNTY, and JOE B. BARNES, COUNTY TREASURER OF OKLAHOMA COUNTY,
Appellees,
and
JAN ERIC CARTWRIGHT, Attorney General of Oklahoma,
Defendant Intervenor/Appellee.

No. 58,438

FILED
SUPREME COURT
STATE OF OKLAHOMA
OCT. 4, 1983
Ross N. Lillard, Jr.
CLERK

SUPPLEMENTAL OPINION ON REHEARING

PER CURIAM:

We hereby supplement the opinion of this Court of May 17, 1983 (54 O.B.J. 1351) as amended by Order of July 26, 1983 (54 O.B.J. 2068) by adding thereto the following:

A further review of *Lemon v. Kurtzman,* 411 U.S. 192, 36 L.Ed.2d 151, 93 S.Ct. 1463 (1973) impels the conclusion that the rule of *Norton v. Shelby County,* 118 U.S. 425, 30

L.Ed. 178, 6 S.Ct. 1121 (1886) (that an unconstitutional statute "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed") was not abandoned in *Lemon*. *Lemon* merely recognized an exception to the rule of *Norton* to be applied by a court of equity under certain prescribed conditions. As we shall briefly demonstrate, the parameters of the *Lemon* exception have many times been recognized and applied by this Court; and we shall further demonstrate that those parameters are not present in the case at bar.

After striking down of Pennsylvania's statutory program to reimburse non-public sectarian schools for secular educational services in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105 (*Lemon I*), the Supreme Court remanded to the district court which enjoined payments for services rendered after *Lemon I*, but permitted reimbursement for services prior to *Lemon I*. Appellants challenged the scope of this decree (a case in *equity*).

The circumstances peculiar to *Lemon II* were:

1. After the statute became effective, the schools entered into the contracts in good faith, relying upon the apparent statutorial authority.

2. Thereafter, Appellants sought preliminary injunction to restrain payment under the scheme. However, Appellants abandoned their request for injunction to prevent the initial payment. The schools continued performing the services authorized by statute. Not until a motion for summary judgment was filed did Appellants first indicate their intent to seek to enjoin.

3. The schools could not, prior to *Lemon I*, have predicted the act's unconstitutionality with assurance sufficient to undermine Appellees' reliance on the statute. *Lemon I* was not "foreshadowed."

4. The schools had a "reliance interest" to be considered in fashioning an *equity* decree calling for a "sensible recognition of the practical realities of the situation."

5. Appellants urged a strange amalgam of flexibility and absolutism, claiming on the one hand they did not seek to have the schools disgorge prior payments, yet seeking to enjoin future payments, and urged injunction under the rule of *Norton*.

6. Great hardship would be imposed upon the public, state officers, school budgets and implemented school programs if the rule of *Norton* were to be immutably applied as of the date of the *Lemon I* decision.

In fashioning the equity decree in the light of the rule of *Norton* and of the "reliance interest" thus demonstrated, the United States Supreme Court observed, statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct; until judges say otherwise, *state officers* have the power to carry forward the directives of the state legislature; those officials may, in some circumstances, elect to defer acting until authoritative judicial pronouncement has been secured; but where there are no fixed and clear constitutional precedents, the choice is essentially one of discretion, and state officials may rely upon the basic presumption of constitutional validity of a duly enacted statute.

The Supreme Court concluded by saying that federalism requires that federal injunction, unrelated to state courts, be shaped with concern and care for the responsibilities of the executive and legislative branches of state government. "In short, the propriety of the relief afforded Appellants by the District Court, applying familiar equitable principles, must be measured against the totality of circumstances and in light of the general principle that, absent contrary direction, state officials and those with

whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful."

The circumstances in the case at bar are not analagous to and, in fact, are significantly different than those in *Lemon II*.

a. *Lemon II* involved the fashioning of a decree in *equity*. The case at bar is a statutory proceeding (denial of protest seeking recovery of taxes paid). While our code pleading purports to abolish the distinction between actions at law and actions in equity, "A party bringing an action is required to frame his pleading in accord with some definite, certain theory, and the relief to which he claims to be entitled must be in accord therewith; on appeal he is bound by the position and theory assumed, and on which the case was heard in the trial court." *Yellow Cab Company v. Allen*, Okl., 377 P.2d 220 (1962), quoting from *Lenz v. Young*, Okl., 307 P.2d 844 (1957). A chancellor has power to do equity and mold a decree to the necessities of a particular case. *U.S. v. Fogaley* (C.A. Okl. 1951) 190 F.2d 163; *Sinclair Oil & Gas Co. v. Bishop*, Okl., 441 P.2d 436 (1967). But in law, a trial court is limited to the particular issues framed by the pleadings. *La Bellman v. Gleason & Sanders, Inc*, Okl., 418 P.2d 949 (1966). In the fashioning of a judgment in law, courts are less impelled to apply principles of equity.

b. No compulsion on the part of public officials to perform statutory duties until otherwise directed by the courts is involved in the case at bar, in contrast to *Lemon II*.

c. General Motors Corporation had a free choice as to whether it would rely upon the opinions and representations of public officials as to the constitutionality of the non-tax "agreements." It was under no compulsion to act in reliance. It could have obtained a declaratory judgment prior to entering into the purported non-tax arrangement.

Instead, it relied upon the representations in the face of the Constitution and laws of Oklahoma, and did so at its peril.

d. There is a strong suggestion of *public weal* involved in *Lemon II* and other cases in considering the force of a "reliance interest" as against the unconstitutionality of a contract or statute where prospective effect is given by court decree to a determination of unconstitutionality. In the case at bar, the reliance interest to be weighed involves General Motors Corporation's individual rights only. In *Lemon II*, mid-term school budgets, programs, and expenditures made in reliance upon a statute would invoke an extreme *public* hardship if abruptly terminated by a decree of unconstitutionality.

Our determination herein that the circumstances present in the case at bar do not place it within the exception enunciated in *Lemon II* to the rule of *Norton* is consistent with the prior holdings of this Court.

In *Oklahoma Ed. Ass'n, Inc. v. Nigh*, Okl., 642 P.2d 230 (1982), a large number of individuals acted in reliance upon the constitutionality of a statute prior to this Court's determining it to be unconstitutional. The liability of public officials who acted in good faith reliance upon the constitutionality of the statute was likewise involved (p. 239). Both considerations impelled the Court to protect officials and citizens from liability which would result if this Court's opinion was given retrospective effect.

In *State ex rel. Poulos v. State Bd. of Equal.*, Okl., 646 P.2d 1269 (1982) (Poulos III), and 552 P.2d 1138 (1976) (Poulos II), an unconstitutionally inequal established system of tax valuation was determined to exist. The ability of the various county governments to function, the reliance interests of great numbers of taxpayers, and the potential liability of public officials were implicitly involved. The Court in fashioning its decree made its effective date prospective.

In *State v. Board of County Com'rs of Creek County*, 188 Okl. 104, 107 P.2d 542 (1940), a large number of delinquent taxpayers secured a reduction of their taxes under a statute thereafter adjudged unconstitutional, while other taxpayers did not. The County Commissioners and County Treasurer continued to act under the law after the action was filed against them questioning the act's constitutionality, and after they had been advised by the Attorney General to refrain from acting under it, and after they were advised by the Attorney General that the act had been adjudged, and was, unconstitutional. During the time the defendant officers were proceeding under the act, they reduced the assessments and taxes on some 4,264 separate pieces of property. Applying what was in effect equity reliance rules, this Court said (547):

> "One asserting rights under such a void law must bring himself within some established exception [to the rule of *Norton*]. The rule that no rights may be acquired under such a statute applies as well to rights acquired under acts performed or executed pursuant to such statute before the final determination of the unconstitutionality thereof, as to those sought to be acquired under acts performed thereunder."

In striking down the statute and in declining to ameliorate the effect of a pronouncement of unconstitutionality, this Court said (554):

> "It follows that the contention of the plaintiffs must be sustained. To hold otherwise and to sustain the judgment of the trial court would be to say that constitutional inhibitions may be lightly defeated and circumvented by subordinate executive officers, acting in excess of their lawful authority, provided the acts of such officers were fully consummated before the extent of their authority is determined in the proper forum — namely the courts. This we cannot do. Such a rule would encourage citizens to rush in and get relief under a doubtful law before its validity could be tested in the courts. It would encourage

hasty action on the part of administrative officers, where deliberation and caution should be encouraged instead. It would discourage the prompt payment of taxes by holding out to the taxpayers the prospect of future legislation under which they might obtain special advantages. It would open an easy avenue for the evasion and defeat of constitutional safeguards, not only in tax matters, but in others."

In *Gordon v. Conner*, 183 Okl. 82, 80 P.2d 322, 118 ALR 783 (1938), plaintiff resident taxpayers sought recovery against the sheriff and members of the board of county commissioners under a statute authorizing the action to recover sums paid to the defendants pursuant to a statute thereafter determined to be unconstitutional. At issue was the weighing of the public interest in recovering sums paid out under a void statute against the duty of public officials to perform their statutory duties and their right to rely upon the statute's presumed constitutionality (p. 324):

"The sheriff, however, relying upon the provisions of the special act, appointed six deputies. In this action plaintiffs seek to recover for the county, a sum equal to the salaries paid to the two deputies from July 1, 1933, to the date of filing the suit (April 27, 1936), and a similar sum for their own use and benefit.

"The trial court held that the special act was unconstitutional, but further held that the case of Wade v. Board of Commissioners of Harmon County, 161 Okl. 245, 17 P.2d 690, was controlling of the issues involved herein. In that case, it was held: 'The members of the board of county commissioners of a county will not be penalized . . . for the payment of salaries to county officers under an unconstitutional local act where such payments were made in good faith and before the law is declared unconstitutional, or before they are advised by the proper official as to its unconstitutionality.'

> "No contention is made that defendants were ever advised by the proper officials as to the unconstitutionality of the special act. Plaintiffs take the position that since this court on several occasions has held similar acts to be unconstitutional, the defendants, being chargeable with a knowledge of the law, are chargeable with knowledge of the unconstitutionality of the special act involved herein. We cannot concur in this contention. The unconstitutionality of the special act involved herein had never been judicially established. Defendants were entitled to rely thereon as a source of authority for their official acts without assuming the risk of incurring heavy penalties in the event such act was subsequently declared to be in controvention of a constitutional provision and therefore invalid. The presumption is that a law is constitutional until its unconstitutionality is judicially established." (Citation omitted.)

State ex rel. Cartwright v. Dunbar, Okl., 618 P.2d 900 (1980) comports with *Lemon II* and the foregoing cases. It is in line with the general rule in Oklahoma and elsewhere. See 16 Am Jur 2d Constitutional Law, §§ 256, 257, 688.

BARNES, C.J., HODGES, LAVENDER, DOOLIN, HARGRAVE, OPALA, and WILSON, JJ., concur.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

OKLAHOMA INDUSTRIES AUTHORITY
and
GENERAL MOTORS CORP.,
Plaintiff,
vs.
JOE B. BARNES, COUNTY TREASURER OF OKLAHOMA COUNTY, et al.,
Defendants,
and
JAN ERIC CARTWRIGHT, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,
Defendant-Intervenor.

No. CJ-80-4524
CJ-81-422

FILED IN THE DISTRICT COURT
OKLAHOMA CITY, OKLA.
APR. 23, 1982
DAN GRAY, Court Clerk
By ..... DEPUTY

JOURNAL ENTRY

NOW on this 25th day of March, 1982, this matter comes on for full hearing before the undersigned Judge on the Motions for Summary Judgment filed herein by Defendants and the Defendant-Intervenor; the Plaintiff, GENERAL MOTORS, appeared by and through its attorneys of record, JOHN JOSEPH SNIDER and MARGARET McMORROW LOVE; the Plaintiff, OKLAHOMA INDUSTRIES AUTHORITY, appeared by and through its attorney of record, DAVID NICHOLS; the Defendants, JOE B. BARNES, County Treasurer, GEORGE KEYES, County Assessor, and the OKLAHOMA COUNTY BOARD OF EQUALIZATION appeared by and through their attorneys of record, GEORGE W. PAULL, JR. and JIMANNE HARRIS MAYS, Assistant District Attorneys;

and the Defendant-Intervenor, JAN ERIC CARTWRIGHT, Attorney General of Oklahoma, appeared by and through his attorneys of record, JAMES B. FRANKS and MICHAEL SCOTT FERN; the Court having considered the Pleadings herein, having considered all affidavits, admissions, answers to interrogatories, stipulations, extracts submitted from depositions and documents and exhibits tendered by all parties, and having heard arguments and statement of counsel and considered all briefs submitted in support of or opposition hereto, and having been fully informed as to all matters sought to be presented by all parties finds as follows:

1. That the argument of counsel and briefs herein as well as the depositions, admissions, pleadings, stipulations, answers to interrogatories, affidavits and exhibits on file and tendered to and considered by the Court reflect that there is no substantial controversy as to any material fact.

2. That Article 10 Section 5 of the Oklahoma Constitution prohibits a contract which surrenders, suspends or contracts away the power of taxation and, although its existence is disputed, such contract, even if it could be established, would be void and contrary to law;

3. GENERAL MOTORS is in possession of the property sought to be taxed under an executory contract of purchase and, therefore, is fully taxable to GENERAL MOTORS under the authority of *State ex rel. Cartwright v. Dunbar,* 618 P.2d 900;

4. That the Attorney General's opinion 79-168 is a correct statement of the law and, therefore, approved by this Court both as to the reasons and conclusions stated therein;

5. That Attorney General's opinion 69-156 was an incorrect statement of the law and, therefore, properly withdrawn by Attorney General opinion 79-168.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motions for Summary Judgment of JOE B. BARNES, County Treasurer, GEORGE KEYES, County Assessor, THE OKLAHOMA COUNTY EQUALIZATION BOARD and JAN ERIC CARTWRIGHT, Attorney General of the State of Oklahoma be and they hereby are sustained.

s/ JACK R. PARR
JACK R. PARR, DISTRICT JUDGE

APPROVED:

s/ JIMANNE MAYS
JIMANNE MAYS, Assistant
District Attorney,
Attorney for Defendants

s/ JAMES B. FRANKS
JAMES B. FRANKS,
Assistant Attorney General,
Attorney for Defendant-
Intervenor

As to form:

s/ JOHN JOSEPH SNIDER
JOHN JOSEPH SNIDER,
Attorney for General Motors

As to form per order of Judge Parr:

s/ DAVID E. NICHOLS
DAVID NICHOLS,
Attorney for Oklahoma
Industries Authority

BOB TURNER FRANK BURNS VELT SHERMAN

THE OKLAHOMA COUNTY
EQUALIZATION AND EXCISE BOARD
ROOM 141 COUNTY OFFICE BUILDING
OKLAHOMA CITY, OKLAHOMA 73102

September 17, 1980

John Joseph Snider
Fellers, Snider, Blankenship, Bailey
& Tippens
2700 First National Center
Oklahoma City, Oklahoma 73102

Re: The Hertz Corp. (Warr Acres)
Acct. #14-788-2030 – File #80-461
The Hertz Corp. (The Village)
Acct. #17-892-1030 – File #80-460
General Motors Corporation
Acct. #14-389-5000 – File #80-458

Dear Mr. Snider:

Your protest has been carefully considered and reviewed by the Board of Equalization. Due to the ruling of the Attorney General and some Court Decisions, in best interest of the Board, we feel it is necessary to deny your request for tax exemption on The Hertz Corporation (Warr Acres), The Hertz Corporation (The Village), and General Motors Corporation.

Sincerely,

BOARD OF EQUALIZATION
OF OKLAHOMA COUNTY

s/ LINDA HOSTLER

Linda Hostler, Secretary

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

GENERAL MOTORS CORPORATION,
Appellant,
v.
OKLAHOMA COUNTY BOARD OF EQUALIZATION, GEORGE KEYES, COUNTY ASSESSOR OF OKLAHOMA COUNTY, and JOE B. BARNES, COUNTY TREASURER OF OKLAHOMA COUNTY,
Appellees,
and
JAN ERIC CARTWRIGHT, Attorney General of Oklahoma,
Defendant-Intervenor/ Appellee.

FILED
SUPREME COURT
STATE OF OKLAHOMA
OCT. 4, 1983
Ross N. Lillard, Jr.
CLERK

No. 58,438

ORDER DENYING PETITION FOR REHEARING ON OPINION AS AMENDED BY ORDER OF JULY 26, 1983

The Petition of Plaintiff-Appellant, General Motors Corporation, for Rehearing on Opinion as Amended by Order of July 26, 1983, is hereby denied.

IT IS FURTHER ORDERED that the Court will not entertain another petition for rehearing.

DONE BY ORDER OF THE SUPREME COURT in conference this 29th day of September, 1983.

s/ DON BARNES
CHIEF JUSTICE

THE ATTORNEY GENERAL
LARRY DERRYBERRY
STATE CAPITAL, OKLAHOMA CITY, OKLAHOMA 73105, TELEPHONE 405/521-2721

October 5, 1976

Mr. Phillip A. Hoffman, Manager
Special Tax Projects
General Motors Corporation
3044 W. Grand Boulevard
Detroit, Michigan 48202

Re: Opinion No. 69-156

Dear Mr. Hoffman:

I am in receipt of your recent request as to whether the state of the law expressed in the above-captioned opinion, a copy of which is attached, is still in force and effect.

I have reviewed said opinion and find the conclusion reached to be a correct analysis of the state of the law in Oklahoma. Since the date of issue of said opinion, I have found no case decisions or legislation that would alter the conclusion reached therein.

Accordingly, it is my opinion that the state of the law expressed in Opinion No. 69-156 is still in force and effect.

Yours very truly,

s/ LARRY DERRYBERRY
Larry Derryberry

LD: aw
Enclosure

LEASE

THIS LEASE, executed in duplicate as of this 1st day of April, 1978, by and between Oklahoma Industries Authority, an agency of the State of Oklahoma, hereinafter called "Lessor", and General Motors Corporation, a corporation organized and existing by virtue of the laws of the State of Delaware, duly qualified to do business in the State of Oklahoma, which corporate address is 3044 West Grand Boulevard, Detroit, Michigan 48202, hereinafter called "Lessee";

WITNESSETH:

Section 1. For and in consideration of the rents to be paid and the covenants and agreements to be performed on the part of Lessee, as are hereinafter set out, Lessor has demised and leased, and by these presents does demise and lease for the term, hereinafter set forth, unto the Lessee all of Lessor's interest in that certain tract and parcel of land situated in Oklahoma County, State of Oklahoma, and being more particularly described in Exhibit "A", which is an estate owned by Lessor severed from the surface and minerals in accordance with an Absolute Grant of Exclusive Right to Use from Lessee to Lessor of even date herewith, together with the improvements thereon, and the machinery and equipment of the Lessor located and to be installed therein, which machinery and equipment is described in accordance with "Exhibit 'B' to Lease Agreement" attached hereto on the date of the signing hereof and initialed by appropriate representatives of Lessor and Lessee.

• • •

Section 13. . . .

• • •

(d) The parties recognize that as the Lessor is an agency of the State of Oklahoma, the Project here de-

mised is not subject to ad valorem taxation under the Constitution and laws of the State of Oklahoma. . . .

• • •

IN WITNESS WHEREOF, Lessor and Lessee have duly executed and affixed their hands and seals to this Lease this 12th day of April, 1978.

OKLAHOMA INDUSTRIES AUTHORITY

By /s/ EDWARD L. GAYLORD

Chairman

ATTEST:

s/ HARRY BIRDWELL

Assistant Secretary

GENERAL MOTORS CORPORATION

By /s/ P. J. COLETTA

Vice President
P. J. Coletta
Vice President

ATTEST:

s/ MARGUERITE NOVELLI

Assistant Secretary
Marguerite Novelli
ASSISTANT SECRETARY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA INDUSTRIES AUTHORITY, an agency of the State of Oklahoma, and GENERAL MOTORS CORPORATION, a corporation,
Plaintiffs,
v.
OKLAHOMA COUNTY EQUALIZATION BOARD and GEORGE C. KEYES, COUNTY ASSESSOR of Oklahoma County,
Defendants.

No. CJ-80-4524

PETITION

(APPEAL FROM BOARD OF EQUALIZATION OF OKLAHOMA COUNTY, OKLAHOMA)

Come now Oklahoma Industries Authority, an agency of the State of Oklahoma ("OIA") and General Motors Corporation, a Delaware corporation ("General Motors") pursuant to 68 O.S. 1971, § 2461 and appeal, in its entirety, the Order of Defendant, Board of Equalization of Oklahoma County, Oklahoma, ("the Board") entered September 17, 1980. By such Order the Board denied the protest filed by Plaintiffs on February 22, 1980, to the ad valorem assessment by Defendant Keyes against Plaintiff General

Motors of certain improvements located in Oklahoma County, Oklahoma.

• • •

10. Attorney General Opinion No. 79-168 is erroneous and the ad valorem assessment of the improvements used by General Motors pursuant to the contract between it and OIA violates the laws of Oklahoma and General Motors' rights under the Constitution of Oklahoma and the Constitution of the United States for the following reasons:

• • •

(c) Enforcement of Attorney General Opinion No. 79-168 or assessment of ad valorem taxes against General Motors on the improvements would constitute an unconstitutional impairment of the obligation of contracts in violation of Article II, Section 15 of the Consitution of Oklahoma and Article I, Section 10 of the Constitution of the United States.

• • •

(g) Enforcement of Opinion No. 79-168 would deprive plaintiff General Motors of due process of law in contravention of Amendments 5 and 14 of the Constitution of the United States.

• • •

WHEREFORE, Plaintiffs pray for judgment against Defendants declaring that the improvements as described in Exhibit E are not subject to ad valorem taxation for the year 1980 or for any other tax year prior to the expiration of the lease between General Motors and OIA; that the assessment thereof by Defendant Keyes be set aside and declared void and illegal; and that the Order of Defendant Board, dated September 17, 1980, be vacated.

Plaintiffs pray for all other further relief to which they may be entitled, and for their costs.

s/ JAMES D. FELLERS

JAMES D. FELLERS,
JOHN JOSEPH SNIDER,
MARGARET MCMORROW-LOVE, of
FELLERS, SNIDER,
BLANKENSHIP, BAILEY
& TIPPENS
2700 First National Center
Oklahoma City, Oklahoma
73102
(405) 232-0621

Attorneys for General Motors Corporation

PETER T. VAN DYKE, of
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HARRINGTON, CHANDLER &
VAN DYKE
2210 First National Center
Oklahoma City, Oklahoma
73102
(405) 235-7471

Attorneys for Oklahoma Industries Authority

No. 83-1056

In the Supreme Court of the United States

OCTOBER TERM, 1983

GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD OF EQUALIZATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari To the Supreme Court of Oklahoma

BRIEF OF THE OKLAHOMA COUNTY BOARD OF EQUALIZATION, *et al.*, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT H. MACY
District Attorney of
Oklahoma County, Oklahoma

FRANK E .WALTA*
Assistant District Attorney

KEVIN C. LEITCH
Assistant District Attorney

202 Robert S. Kerr Avenue
Oklahoma City, Okla. 73102
Tel. (405) 235-5522

Attorneys for Respondent

March, 1984

*Counsel of Record

QUESTION PRESENTED

Whether Petitioner may invoke the jurisdiction of this Court alleging impairment of contract in derogation of the Contract, Due Process and Taking Clauses of the Federal Constitution where:

1. Petitioner has wholly failed to show the existence of a contract and in the face of a record which reflects that no contract was ever made;
2. The courts below did not decide Petitioner's claim of impairment; and
3. Petitioner's alleged contractual tax exemption is void *ab initio* under the constitution of the State of Oklahoma.

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No. 83-1056

In the
Supreme Court of the United States
OCTOBER TERM, 1983

GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD OF EQUALIZATION, ET AL.,
Respondents.

BRIEF OF THE OKLAHOMA COUNTY BOARD OF EQUALIZATION, *et al.*, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The power of taxation shall never be surrendered, suspended, or contracted away . . .

OKLA. CONST. art. 10, §5.

The legislature shall pass no law exempting any property in this state from taxation, except as otherwise provided in this Constitution. . . .

OKLA. CONST. art. 5, §50.

The legislature shall pass no law granting to any . . . corporation . . . any exclusive rights, privileges, or immunities within this State.

OKLA. CONST. art. 5, §51.

[N]or shall the State . . . make donation . . . by tax, or otherwise, to any company, association, or corporation.

OKLA. CONST. art. 10, §15.

All property which may be taxed ad valorem shall be assessed for taxation. . . .

OKLA. CONST. art. 10, §8.

No ad valorem tax shall be levied for state purposes, nor shall any part of the proceeds of any ad valorem tax levy upon any kind of property in this State be used for State purposes. . . .

OKLA. CONST. art. 10, §9.

The powers of the government of the State of Oklahoma shall be divided into three separate departments: the Legislative, Executive and Judicial . . . and neither shall exercise the powers properly belonging to either of the others.

OKLA. CONST. art. 4, §1.

The legislative authority of the State shall be vested in a Legislature. . . .

OKLA. CONST. art. 5, §1.

The executive authority of the state shall be vested in a . . . Attorney General. . . .

OKLA. CONST. art. 6, §1.

All property of . . . this state and of the counties and of municipalities . . . shall be exempt from taxation.

OKLA. CONST. art. 10, §6.

All property in this state, whether real or personal, except that which is specifically exempt by law . . . shall be subject to ad valorem taxation.

OKLA. STAT. tit. 68, §2404 (1981).

Real property, for the purpose of ad valorem taxation, shall be construed to mean the land itself . . . and all buildings, structures and improvements. . . .

OKLA. STAT. tit. 68, §2419 (1981)

The duties of the Attorney General as Chief Law Officer of the State shall be:

• • •

(e) To give his opinion in writing upon all questions of law submitted to him by the Legislature, or either branch thereof, or by any state officer, board, commission or department, provided, that the Attorney General shall not furnish opinions to any but district attorneys, the Legislature or either branch thereof, or any other state official, board, commissioner or department, and to them only upon matters in which they are officially interested.

OKLA. STAT. tit. 74, §18b(e) (1981).

STATEMENT OF THE CASE

Respondent takes issue with Petitioner's statement of the case and offers the following chronology. In 1973 the Petitioner, General Motors Corporation, acquired actual record legal title, by Warranty Deed, to certain property located in Oklahoma City for the express purpose of constructing an automobile assembly plant thereon (R. 96, Appendix A). Shortly thereafter Petitioner commenced construction of the facility which construction was thereafter temporarily suspended.

On October 4, 1976, more than three (3) years after acquiring the property at issue and commencing construction of its automobile facility, the one and only meeting between officials of Petitioner and officials of the State of Oklahoma regarding taxes was held. At that meeting Philip Hoffman, the Manager of Property Taxes for Petitioner, met informally with several non-governmental representatives of the local Chamber of Commerce, a member of the Governor's staff, two members of the Tax Commission, the Attorney General, and the attorney for the Oklahoma Industries Authority (OIA), a public trust authority.

A memorandum of the meeting (Appendix B) prepared by a representative of the Chamber of Commerce, reflects that only a limited portion of the meeting related to ad valorem taxation. Specifically, mention was made of Attorney General's Opinion #69-156 (Appendix C) which concluded that leasehold interests in property which is *owned* by a public trust authority are not subject to ad valorem taxes.

The memorandum further reflects that all individuals present were aware that Petitioner, rather than the trust authority, owned the property on which the Petitioner's plant is located and, therefore, the conclusion enunciated by Attorney General Opinion #69-156 was inapplicable to Petitioner (R. 800, Deposition Hoffman pp. 41, 103-104). As a result of this obvious distinction the question arose as to whether land and buildings were separately taxable:

> "The Attorney General further stated that he would make every effort to secure an answer related to separate ad valorem taxation of buildings and land." (Appendix B paragraph 3)

Despite recognition of this material factual distinction between the assumed facts of Attorney General Opinion #69-156 and the actual facts present in the Petitioner's circumstances, neither the Attorney General nor Petitioner pursued an answer to this critical question.

> "Q. It indicates in paragraph three that Mr. Derryberry assured you that he would make every effort to secure an answer related to separate ad valorem taxation of buildings and land.
>
> Did you ever receive such a specific answer?

A. That had regard to the technical problem of G.M. regarding owning the land. And did I receive a specific answer from Mr. Derryberry?

No.

Q. Did General Motors do any research in this area in reference to the problem of separate ad valorem taxation of buildings and land in Oklahoma City?

A. I don't recall."
(R. 800, Deposition Hoffman, pp. 48-49)

Had either the Attorney General or Petitioner pursued the question raised in the only meeting related to the Petitioner's facility, they would have readily discovered that under Oklahoma law, land, and buildings erected thereon, are not separately taxable for ad valorem purposes. OKLA. STAT. tit. 68, 2419.

At the meeting it was made clear to the representative of Petitioner that the State of Oklahoma did not levy ad valorem taxes, that ad valorem taxes were purely local taxes and that any claim to a legitimate exemption would have to be presented to and determined by the County Assessor (R. 805, Deposition Merrill, Chairman of the Oklahoma Tax Commission).

> "Now, of course, as to the ad valorem tax exemptions, I am quite sure that I made it clear to Mr. Hoffman . . . that the state does not levy an ad valorem tax . . . that he would have to deal with the County Assessor and lay claim to his exemptions and point to the law which specifically provided that exemption and convince the County Assessor that it was, in fact, exempt from ad valorem taxes . . ." (Deposition Merrill. pp. 17-18).

> ". . . the state does not have an ad valorem tax, it's purely a local jurisdiction tax, county, school, city, and that the administration of that is in the hands of the County Assessor . . . it would be the County Assessor determination whether, in fact, land was taxable within their county . . . that is left to his discretion to deal with the taxpayer on whether a legitimate exemption exists or not with respect to that taxpayer's property." (Deposition Merrill, pp. 50-53)

Commissioner Merrill's assertion to the representative of Petitioner was in strict conformity with an express provision of the Oklahoma Constitution.

> "No ad valorem tax shall be levied for state purpose, nor shall any part of the proceeds of any ad valorem tax levy upon any kind of property in this State be used for State purposes . . ." OKLA. CONST. art. 10, §9.

The record reflects that not one of the Respondents, all of whom are taxing officials of the county, were present at the informal gathering on October 4, 1976. No representatives of the governmental body responsible for assessment, collection and administration of ad valorem taxes were present at the meeting.

Petitioner admits that *none* of the Respondents, neither the Oklahoma County Assessor, Treasurer nor representative of the County Board of Equalization, ever made any representation to Petitioner as to the availability of ad valorem exemptions on the Petitioner's project (R. 472).

Furthermore, Commissioner Merrill testified that no state official present at the meeting promised Petitioner ad valorem exemptions, nor were the officials at the meeting in any position to make a "deal or agreement" with regard

to ad valorem taxation (R. 805, Deposition Merrill, pp. 35, 57). Commissioner Merrill's recollection of the meeting is substantiated by the admission of Petitioner that neither the Governor, the Attorney General, nor any tax official of the State of Oklahoma, ever executed any agreement with Petitioner that the Petitioner's facility would not be subject to ad valorem tax (R. 473-474).

On April 12, 1978, after owning the property five (5) years, Petitioner executed and filed of record a document entitled "Absolute Grant of Exclusive Right to Use" (Appendix D) whereby Petitioner purported to grant to the Oklahoma Industries Authority (OIA) the right to use the surface of the Petitioner's property for a period of twenty years and one day.

> ". . . whereas General Motors Corporation . . . is the owner of certain realty in Oklahoma County, State of Oklahoma . . . General Motors herewith gives and grants an exclusive right to use all of the herein described realty to OIA retaining . . . the parties recognize that bare legal title of surface and minerals will remain in General Motors and will be subject to ad valorem taxation as now and hereafter existing under the laws of the State of Oklahoma." (Appendix D)

Simultaneously, on April 12, 1978, the OIA executed a document labeled "Lease" (Appendix E) whereby the OIA leased back to Petitioner its "right to use" the surface of the Petitioner's property for a like term:

> ". . . OIA has demised and leased, and by there presence does demise and lease . . . unto G.M. all of OIA's interest in that certain tract and parcel of land situated in Oklahoma County, State of Oklahoma . . . which is an estate owned by OIA . . . in accordance

with an Absolute Grant of Exclusive Right to Use from G.M. to OIA of even date herewith . . ." (Appendix E)

This purported "lease" is the only executed document offered by Petitioner to support the existence of its alleged "contract of exemption" from ad valorem taxation. However, this instrument, by its own terms, negates Petitioner's contentions specifically contemplating and making express provision for the payment of ad valorem taxes by Petitioner:

"Section 13

(a) G.M. shall pay all special assessments levied against the project, and all personal property taxes assessed . . .

(b) In the event the State of Oklahoma, or any political subdivision thereof, shall demand of OIA or G.M. the payment of any general or ad valorem tax of the property . . .

(c) G.M. may, at its own expense and in its own name . . . contest any such assessment . . . Should any such tax or assessment be determined by the Court of final jurisdiction to which the question may have been appealed to be due and owing then the same shall be paid by G.M.

(d) . . . G.M. will pay any and all ad valorem taxes assessed against the surface ownership of the Exhibit A realty . . ." (Appendix E)

In the proceedings below, Petitioner admitted that it had agreed to pay all property taxes imposed on the project (R. 457).

On July 31, 1979, pursuant to proper request and in accordance with state law, a new Attorney General issued Opinion #79-168, a 22-page opinion which, relying on Oklahoma Constitutional provisions, statutory and case law, concluded leasehold interests in properties owned by public trusts are taxable. This opinion withdrew opinion #69-156 which relied on one 1906 West Virginia case.

Petitioner claims that Attorney General Opinion #79-168 is a "legislative act" that impaired their alleged contract of exemption. Respondents assert that neither opinion was a "legislative act" and neither was applicable to Petitioner in any event, since the opinions dealt with properties title to which is held by public trusts, and in the instant case Petitioner is the record title owner of the property at issue.

In the proceedings below Petitioner admitted that it represents itself to be and treats itself as the owner of the land and buildings for financial reporting and state and federal income tax purposes (R. 459). Further, Petitioner admitted that it claims investment tax credits, interest and depreciation deductions on the building as if the owner for state and federal tax returns (R. 193).

Petitioner participated as amicus curiae in *State ex rel. Cartwright, et al.*, v. *Dunbar, et al.*, 618 P.2d 900 (Okla. 1980), wherein the Attorney General brought an action to compel the County Assessor to place the property of two purported "lessees" of a public trust on the ad valorem tax rolls. In that proceeding, the alleged "lessees" claimed that the properties were owned by a public trust and, therefore, exempt from ad valorem taxation. Further, the "lessees" sought to challenge Attorney General Opinion #79-168 to the extent

it held leasehold interests in properties owned by public trusts to be taxable.

The Attorney General argued that the alleged "leases" were a sham and that the "lessees" were taxable because they owned the property and since there was no valid "leasehold", Attorney General Opinion #79-168 was neither applicable nor properly in issue.

On January 29, 1980, the Supreme Court of Oklahoma held in *Dunbar* as follows:

> "Article X, Section 6 of the Oklahoma Constitution provides that '. . . all property of . . . this state, and of the counties and of the municipalities . . . shall be exempt from taxation . . .'
>
> * * *
>
> The critical issue is the meaning of the term 'property *of* this state, and *of* counties and *of* municipalities . . .'
>
> * * *
>
> . . . the determinative factor is 'ownership'. Therefore, we must determine the quantum of interest which 'lessees' have in the properties. If their interest is sufficient to constitute 'ownership' such property is not tax exempt . . .
>
> * * *
>
> The 'Lease Agreements' reveal numerous obligations and rights of the 'lessees' which are not ordinarily incidents of a leasehold estate . . . the substance of a transaction and not the name the parties have given it should determine the taxable status of property . . .
>
> * * *
>
> We conclude that . . . Lessees . . . are the 'owners' even though legal title to the properties is in . . . a public trust.
>
> * * *

> It is contended that the imposition of any tax upon public trust property would be an impairment of contractual obligations . . . The primary principle upon which it is contended that public trust property is not taxable is that it is constitutionally exempt from tax ation because a tax-exempt entity . . . 'owns' such property. The failure of the taxing authorities to place public trust property on the tax rolls has not been due to some legislative enactment specifying that such property was not taxable, neither do petitioners attempt to tax such property because of a legislative change . . .
>
> Therefore, no legislative enactment has impaired a contractual obligation.
>
> * * *
>
> . . . in holding that such property is taxable, we have not overruled any previous decisions nor is our decision in conflict with any decision . . .
>
> * * *
>
> We hold that the imposition of a tax upon the property in question would not violate the constitutional prohibition against impairment of contractual obligations . . ."

In January, 1980, the Respondent County Assessor assessed Petitioner on the land and buildings which constitute the Oklahoma City project for 1980. Petitioner protested the assessment to the Respondent Oklahoma County Board of Equalization which upheld the assessment on September 17, 1980. On September 25, 1980, Petitioner appealed the assessment to the District Court of Oklahoma County that "enforcement of Attorney General Opinion #79-168" would constitute an impairment of contract and deprive Petitioner of due process of law (R. 5).

In the court below, Petitioner readily conceded that it owns the property sought to be taxed ad valorem and that the property is taxable under *Dunbar,* but for the alleged contract of exemption.

> ". . . General Motors did *not* contend in the District Court and does *not* contend here that the State of Oklahoma is the owner of the General Motors plant . . . It is uncontested also that such an ownership interest would be taxable under *Dunbar, but for the tax abatement agreement.*" (Brief of Appellant G.M., p. 28; emphasis by G.M.)

In conceding its property to be taxable under *Dunbar, supra,* Petitioner conceded Attorney General Opinion #79-168 was inapplicable to the facts presented below and thus had no effect on any alleged contract:

> "We should first classify the issues . . . The legal theory upon which the Attorney General based his July 31 opinion 79-168 is not the primary basis upon which petitioners predicate their entitlement to the writ sought in this action. A fair reading of the July 31 opinion discloses that it is based upon the conclusion that the leasehold interest of a private lessee in public trust property is taxable . . . In this action, petitioners rely primarily upon the doctrine of 'equitable ownership' . . . We are concerned here with only the legal issues presented on this record, not with abstract questions of law concerning the correctness of the July 31 opinion of the Attorney General. Although it may appear that this action presents the correctness of that opinion, the issues as framed by the record are entirely different. The Attorney General was responding to the narrow legal question posed, i.e., whether a 'leasehold' interest in public trust property is taxable. Tax liability is sought here on a broader basis, i.e., that lessees are the 'owners' of their respective properties.

> As the discussion which follows indicates, the record demonstrates conclusively that we are not dealing with 'lease-hold' interest." 618 P.2d at 904.

Respondents asserted in the District Court among other things that Petitioner had no contract of exemption, the Petitioner had expressly agreed to pay ad valorem taxes, that Petitioner was the owner of the project, that Attorney General Opinion #79-168 was neither applicable nor a "legislative act" and that Article 10 §5 of the Oklahoma Constitution precluded the existence of a valid contract of exemption:

> "The power of taxation shall never be surrendered, suspended, or contracted away . . ." OKLA. CONST. art. 10, §5.

Respondents moved for Summary Judgment and the District Court, on March 25, 1982, after reviewing the pleadings, briefs, affidavits, admissions, interrogatories, stipulations, documents, depositions and exhibits, granted Summary Judgment to Respondents holding, among other things:

> "That Article 10 Section 5 of the Oklahoma Constitution prohibits a contract which surrenders, suspends or contracts away the power of taxation and, although its existence is disputed, such contract, even if it could be established, would be void and contrary to law." (R. 703-704, Journal Entry)

Petitioner appealed the decision of the District Court to the Supreme Court of Oklahoma alleging impairment of contract. On September 17, 1983, the Oklahoma Supreme Court held:

"GMC concedes that its assembly plant would be taxable under *Dunbar* but for the tax abatement agreement.

* * *

We will now consider the enforceability of the alleged tax abatement. *GMC did not introduce the agreement into the record* . . . In its journal entry of judgment the trial court in referring to the agreement said 'although its existence is in dispute, such contract, even if it could be established, would be void and contrary to law.'

The lease agreement between GMC and OIA did not spell out the tax abatement agreement but it did mention ad valorem taxes . . . the parties agree that in the event the State of Oklahoma or any of its subdivisions shall demand the payment of any general or ad valorem tax that GMC would pay the tax.

* * *

The purported tax abatement contract was not in accord with Oklahoma law at the time it was made.

* * *

Our decision in *Dunbar* is controlling in the case at bar and GMC's property is subject to ad valorem taxation unless the alleged tax abatement agreement is enforceable. The Federal Constitution does not protect unenforceable contract rights. The alleged agreement is void because no public official or public agency could constitutionally grant the tax exemption contained in the agreement. Since such agreement is unenforceable, GMC is not entitled to the tax relief it sought." (See Appendix A-1 through A-8 to the Petition for Certiorari)

On July 26, 1983, on Petition for Rehearing, the Oklahoma Supreme Court further clarified its ruling and upheld the assessment (See Appendix A-9 through A-12 to

Petition for Writ of Certiorari). On October 4, 1983, the Oklahoma Supreme Court supplemented its opinion on Petition for Rehearing and upheld the assessment (See Appendix A-13 through A-20 to Petition for Writ of Certiorari).

REASONS FOR DENYING THE WRIT OF CERTIORARI

Certiorari should be denied because:

1. No contract existed, *de jure* or *de facto*, to be impaired.
2. State court decisions below did not decide the issue of impairment of contract.
3. An alleged contract which is unlawful and void *ab initio* under a valid pre-existing state constitutional provision is not protected by the Contract Clause of the Federal Constitution.

I.

NO FEDERAL QUESTION IS PRESENTED FOR THIS COURT TO REVIEW BECAUSE NO CONTRACT EVER EXISTED BETWEEN THE PARTIES AND THEREFORE THE CASE DOES NOT INVOLVE THE CONTRACT CLAUSE.

Petitioner claims to be exempt from the payment of ad valorem taxes because of the purported "agreement" it had with the OIA. Generally, "a taxpayer claiming immunity from tax has the burden of establishing his exemption." *General Motors Corp.* v. *Washington*, 377 U.S. 436, 441 (1964). Because Petitioner is the proponent of the contract it has the burden of proving its existence. *Owens* v. *Sun Oil Co.*, 482 F.2d 564 (10th Cir. 1973).

A. No Contract Exists *De Jure*

The existence of the contract is a matter of state law even though this Court makes an independent examination of the facts. *Appleby* v. *City of New York*, 271 U.S. 364 (1926); *State* v. *Brand*, 303 U.S. 95 (1938). OKLA. STAT. tit. 15, §2 (1981), provides:

> It is essential to the existence of a contract that there should be:
>
> 1. Parties capable of contracting;
> 2. Their consent;
> 3. A lawful object; and,
> 4. Sufficient cause or consideration.

These essential elements of a contract are not fulfilled in this case.

1. Parties Are Incapable of Contracting

Petitioner claims that the State itself was a party to the tax exemption agreement. However, the State neither levies nor receives the benefit of ad valorem taxes and would be powerless to agree to such exemption even if taxs could be contractually waived. Such taxes pertain only to county government.

> "No ad valorem tax shall be levied for State purposes, nor shall any part of the proceeds of any ad valorem tax levy upon any kind of property in this State be used for State purposes." OKLA. CONST. art. 10, §9, para. 2.

Two recent state decisions which Petitioner attempts to distinguish from this case, *Chemical Bank* v. *Wash. Pub-*

lic Power Supply System, 666 P.2d 329 (Wash. 1983), and *Asson* v. *City of Burley*, 670 P.2d 839 (Idaho 1983), involve contracts made by a utility. The courts ruled that the officials executing the contracts had exceeded their constitutional authority and that the contracts were void. *See also, Mountain St. Tel. & Tel. Co.* v. *Ogden City*, 487 P.2d 849 (Utah 1971). The same circumstances are alleged in this case; hence there is no contract.

2. Parties Did Not Consent

There existed no consent by any official, county or state, to exempt petitioner from ad valorem taxes, as will be subsequently shown.

3. The Purported Agreement Did Not Have a Lawful Object

A contract cannot be for an unlawful purpose. Unlawful contracts include those which are contrary "to an express provision of law." OKLA. STAT. tit. 15, §211 (1981).

The alleged agreement is plainly contrary to the express provisions of the constitution of the State of Oklahoma.

> "The power of taxation shall never be surrendered, suspended, or contracted away. Taxes shall be uniform upon the same class of subjects." OKLA. CONST. art. 10, §5.

It is important to note that the trial court, in sustaining Respondent's Motion for Summary Judgment, specifically addressed this fundamental Oklahoma law in its findings:

> "That Article 10, Section 5 of the Oklahoma constitution prohibits a contract which surrenders, suspends

> or contracts, away the power of taxation and, although its existence is disputed, such contract *even if it could be established*, would be void and contrary to law." (Emphasis added)

The alleged agreement is also contrary to another express provision of the Constitution of the State of Oklahoma.

> "The legislature shall pass no law exempting any property withis [*sic*] this state from taxation, except as otherwise provided in this Constitution." OKLA. CONST. art. 5, §50.

This provision was construed in *County Assessor* v. *Carpenter and Joiners, Local 329*, 211 P.2d 790 (Okla. 1949), as follows:

> "[The Legislature] is without power to grant exemptions other than those recognized by the Constitution or to enlarge the exemptions so recognized." 211 P.2d at 794.

By a clear constitutional prohibition, the people of Oklahoma have foreclosed any favoritism of taxpayers. The purpose of the purported agreement is obviously unlawful.

In *City of New Orleans* v. *New Orleans Water Works Co.*, 142 U.S. 79 (1891), a water company claimed that the assessment of taxes impaired its tax exemption contract with the city. The Louisiana constitution provided, however, that the legislature had no power to exempt property from taxation except as used for church, school or charitable purposes. This Court dismissed the case for lack of federal jurisdiction:

> "There are several reasons, however, why the city cannot claim that this contract was impaired by subse-

quent legislation: first, because the contract itself . . . was *ultra vires* and void, and was so declared by the Supreme Court of Louisiana . . ." 142 U.S. at 88.

In *Mississippi and Mo. R.R.* v. *McClure*, 77 U.S. 511 (1871), this Court was called upon but declined to determine the validity of bonds which had been held by the state supreme court to be void and forbidden by the state constitution.

> "The question of the validity of the bonds is not one of federal jurisdiction . . . [T]he State has passed no law upon the subject and the Constitution of the State . . . was in force when the bonds were issued." 77 U.S. at 515, *accord*, *Lake Superior Consol. Iron Mines* v. *Lord*, 271 U.S. 577 (1926).

Respondent submits the same principle applies here.

B. No Contract Exists *De Facto* Because No Consent Was Ever Given to an Exemption

The record reflects no agreement to exempt Petitioner from payment of ad valorem taxes. Significantly, Petitioner never introduced the alleged agreement into the record. The existence of a contract exempting one from taxation cannot be lightly inferred.

> "Even if the borough could have made a contract of exemption . . . there is nothing to show that it did so. . . . On the contrary . . . where one relies upon an exemption both the powers to exempt and the contract of exemption must be clear. Any doubt or ambiguity must be resolved in favor of the public. Here *there is not only no language of exemption, but a positive statement on the part of the lessee to pay the public taxes on the land. In compelling them to*

> *do so the contract is enforced instead of impaired."* *J. W. Perry Co.* v. *Norfolk*, 220 U.S. 472, 480 (1911). (Emphasis added)

Contracts of exemption must be construed narrowly and strictly. *Atlantic Coast Line R.* v. *Phillips*, 332 U.S. 168 (1947); *Keefe* v. *Clark*, 322 U.S. 393 (1944). Under Oklahoma law, any doubt as to the intent of an agreement must be resolved against the grant of exemption.

> "Whoever insists that any particular property is not subject to the same burden as imposed by law on the same character of property similarly circumstanced, has the burden of proof, and must make it clear that by contract or otherwise the property is beyond its reach. Claims of exemption from taxation must be plainly and unmistakably supported by express grant. It cannot exist by implication only. A doubt is fatal to the claim." *Oklahoma City* v. *Shields*, 22 Okla. 265, 293, 100 P. 559, 571 (1908).

As the statement reflects, there was no exemption agreement with the Governor or the Attorney General of Oklahoma, nor with the Oklahoma Tax Commission. None of the parties here made such an agreement. Petitioner owns the project site in fee simple and *explicitly agreed in its "Lease" to pay all ad valorem taxes assessed on the site.* There was obviously no meeting of the minds as to a tax exemption agreement.

II.

THE ALLEGED CONTRACT WAS NOT IMPAIRED BY LEGISLATIVE ACTION WITHIN THE MEANING OF THE FEDERAL CONSTITUTION.

Although Petitioner claims there is legislative action on the part of the Attorney General of Oklahoma, this position is entirely erroneous. The legislative authority of the State is vested solely in the state legislature. OKLA. CONST. art. 5, §1. The Attorney General is an executive officer of the State, and may not exercise any legislative functions. OKLA. CONST. art. 6, §1, art. 4 §1. He is required by statute, to give his opinion on law at the request of certain public officials. OKLA. STAT. tit. 74, §18b(e); *Grand River Dam Auth.* v. *State*, 645 P.2d 1011 (Okla. 1982). He may not give advice to private citizens or corporations, but gives opinions "not in the exercise of any power inherent in the office to make 'rules' or law, but in fulfillment of his duty to give legal advice to those who administer the government of the state." *Id.*, at 1017. The actions of the Attorney General of Oklahoma do not constitute legislative action.

Parenthetically, the actions complained of do not impair Petitioner's alleged contract. OKLA. ATTY. GEN. OPIN. 69-159 concluded that leasehold interests in property owned by public trusts were not taxable. OKLA. ATTY. GEN. OPIN. 69-156 concluded that leasehold interests in property owned by public trusts were taxable and withdrew the contrary conclusion in 69-156. Petitioner concedes that it was the taxable owner of the property in question and, therefore, that it was not a lessee. Neither Attorney General's opinion applies to Petitioner. Neither opinion impairs the alleged contract.

It is well settled that Respondents are not estopped by the acts of public officials who entered into an arrangement or agreement to do or cause to be done what the Oklahoma constitution does not permit. *Harris* v. *State*, 251 P.2d 700 (Okla. 1952); *accord, Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917). One who deals with a public official must ascertain that he who purportedly acts for the state stays within the scope of his authority. *Federal Crop Insur. Corp.* v. *Merrill*, 332 U.S. 380 (1947); *Harris, supra.* Therefore, no estoppel can grow out of negotiations with a public official who acts beyond his powers. *United States* v. *Stewart*, 311 U.S. 60 (1940); *Bonney* v. *City of Britton*, 214 P.2d 249 (Okla. 1950).

Because the public officials involved here have no authority to execute a contract of tax exemption, the alleged "assurances" made to Petitioner were no more than erroneous and unauthorized opinions. Mere opinions of public officials cannot estop the taxing authorities. *Utah* v. *United States*, 284 U.S. 534 (1932); *State ex rel. Comm'rs of Land Office* v. *Shull*, 279 P.2d 339 (Okla. 1955). Even where one has relied upon opinions of public officials to one's detriment, an estoppel will not lie. *Federal Crop Insur. Corp.* v. *Merrill, supra*; *James* v. *State*, 15 P.2d 591 (Okla. 1932). The Contract Clause is infringed only when a legislative enactment impairs the contract. *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444, 451 (1924); *Barrows* v. *Jackson*, 364 U.S. 249, 260 (1953).

A "statute of a state" has been defined by this Court to mean "any enactment, from whatever source originating, to which a state gives the force of law. . . ." *Williams* v. *Bruffy*, 96 U.S. 176, 182-83 (1880). *See, John P. King Mfg.*

Co. v. City Council, 277 U.S. 100 (1928). During its last term, this Court discussed the nature of legislative action in *Perry Educ. Assn. v. Perry Local Educ. Assn.*, ... U.S. ....., 103 S.Ct. 948 (1983). The argument that a collective bargaining agreement was legislative in character because it was intended "to be observed and applied in the future" was rejected. "Not every government action which has the effect of law is legislative action." ..... U.S. ....., 103 S.Ct. at 953.

In this case, no action was taken by the Oklahoma Legislature which impaired Petitioner's "contract". Hence, there is no Contract Clause question presented for this Court's review.

III.

THIS COURT LACKS JURISDICTION TO HEAR PETITIONER'S ARGUMENTS BASED UPON THE CONTRACT, DUE PROCESS AND TAKING CLAUSES OF THE FEDERAL CONSTITUTION.

The present case comes before this Court on a Petition for a Writ of Certiorari. Petitioner asserts that this Court's jurisdiction is founded on 28 U.S.C. §1257, which provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States or where any title, right, or immunity

> is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

It is a fundamental principle that the Petitioner's circumstances must fulfill the requirement of §1257 in order for it to be heard by this Court. *F. G. Oxley Stove Co.* v. *Butler Co.*, 166 U.S. 648 (1897); *Baldwin* v. *Kansas*, 129 U.S. 52 (1889).

Petitioner seeks to come within the purview of the provision for review "where any title, right, privilege or immunity is specially set up or claimed under the Constitution. . . ." From the earliest days of this Court, it has been held that the claim to a constitutional right must have been presented to and decided by the state court whose judgment is being reviewed.

> "We held early on that §25 of the Judiciary Act of 1789 [the ancestor of §1257] furnished us with no jurisdiction unless a federal question had been both raised and decided in the state court below. As Justice Story wrote in *Crowell* v. *Randell*, 10 Pet. 368, 391, 9 L.Ed. 458 (1836), 'If both of these requirements do not appear on the record, the appellate jurisdiction fails.'" *Illinois* v. *Gates*, ... U.S. ....., 103 S.Ct. 2317, 2321 (1983).

The federal right must be declared explicitly in the state court; it must be claimed "unmistakably". *F. G. Oxley Stove Co.* v. *Butler Co.*, 166 U.S. 648 (1897). The federal right must be passed upon by the state court.

> "[I]t must appear from the record, by clear and necessary intendment, that the federal question was directly involved, so that the state court would not have given judgment without deciding it. . . ." *Sayward* v. *Denny*, 158 U.S. 180, 184 (1895).

A. Contract Clause — Opinion by State Court

Petitioner has artfully, but in a grossly misleading manner, informed this Court:

> "In reaching its decision, the Oklahoma Supreme Court assumed that petitioner and the State did in fact enter into a contract pursuant to which the Oklahoma City plant was to be exempt from property taxes for twenty years. (Pet., 8)

This statement was obviously inserted to convince this Court that a contract existed in order to invoke jurisdiction under the federal Constitution. The Oklahoma Supreme Court in fact states in pertinent part:

> "We will assume, *arguendo*, that OIA, a state agency, entered into the tax abatement agreement with GMC . . . (Pet., A-7) (Emphasis added).

Thus, the Oklahoma Supreme Court was clearly addressing the lack of power of state officials to enter into such contract, rather than assuming a contract existed which could be arguably used for federal jurisdictional purposes.

B. Due Process, Taking Clauses — Opinion by State Court

Further, the Due Process and Taking Clause arguments were not unmistakably presented to the Oklahoma Supreme Court. The Petition-in-Error did not mention the Taking Clause of the U. S. Constitution, Amendment V. Petitioner's Brief-in-Chief in the court below propounded the Due Process Clause in three scant pages and referred weakly but once to the Taking Clause. The briefs in the trial court never covered either clause. Surely it cannot be said that the Due Process and Taking Clauses were clearly presented

below. Furthermore, neither clause was passed upon by the Oklahoma Supreme Court. The court explicitly ruled, "In view of our decision here, we find it unnecessary to consider the force and effect of . . . the Fourteenth Amendment to the U. S. Constitution." This Court should not review a constitutional decision that never occurred. The Oklahoma Supreme Court manifestly gave judgment without deciding the Due Process and Taking Clause issues. Under such circumstances, this Court has no jurisdiction to consider the issue now. *Dewey* v. *City of Des Moines*, 173 U.S. 193 (1899). By refusing to hear Petitioner's Fifth Amendment arguments, this Court will be sure to avoid the consideration of a constitutional argument on an inadequate record and to maintain the proper relationship between state and federal courts. *Illinois* v. *Gates*, ____ U.S. ____, 103 S.Ct. 2317, 2323 (1983).

IV.

JUDICIAL RETROACTIVITY IS NOT A VALID ISSUE IN THIS CASE.

The petition is largely devoted to the issue of whether the decision of the Oklahoma Supreme Court was correct in light of *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973), and *Great No. Ry.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932). Those cases, concerning the nonretroactivity of the judicial decision, do not apply here. The Oklahoma constitution has always prohibited contracts of tax exemption. OKLA. CONST. art. 5 §50; art. 10 §5. Further, the constitution and statutes of the State of Oklahoma explicitly state that all property which can be taxed *must* be taxed.

> "All property which may be taxed ad valorem shall be assessed for taxation. . . ." OKLA. CONST. art. 10 §8.

> "All property in this state, whether real or personal, except that which is specifically exempt by law . . . shall be subject to ad valorem taxation." OKLA. STAT. tit. 68 §2404 (1981).
>
> "Real property, for the purpose of ad valorem taxation, shall be construed to mean the land itself . . . and all buildings, structures and improvements. . . ." OKLA. STAT. tit. 68 §2419 (1981).

In addition, the granting of a tax abatement to the Petitioner would accomplish indirectly what the Oklahoma Constitution affirmatively prohibits.

> "The legislature shall pass no law granting to any . . . corporation . . . any exclusive rights, privileges, or immunities with the State." OKLA. CONST. art. 5 §51,
>
> "[N]or shall the State . . . make donation . . . by tax, or otherwise, to any company, association, or corporation." OKLA. CONST. art. 10, §15.

Thus, the ruling of the lower court was constitutionally compelled and anticipated, and no contradictory precedent exists.

A direct foreshadowing of the decision below is the case of *State* v. *Ford*, 434 P.2d 934 (Okla. 1976), in which the court held that a statute exempting industrial tracts of 40 acres or larger was unconstitutional.

> "That part of 11 O.S. Supp. 1965, Sec. 481 which provides that 'tracts of land in excess of forty acres shall not be subject to city taxes when located within a city or town and when used for industrial or commercial purposes' is not authorized by Art. 10, Sec. 6, and the territorial statute, Sec. 458, supra, unless authorized under 11 O.S. 1861 Sec. 6, and constitutes no authority for classifying such tracts as exempt from city taxes." 434 P.2d at 938.

The Attorney General also foreshadowed Petitioner's being a taxable owner in OKLA. ATTY. GEN. OPIN. 74-229:

> "Title to the facility is indeed normally held by the industrial public trust authority during the time in which its revenue bond indebtedness is outstanding to allow the trust to grant a mortgage and security for the bondholders; however, in almost all situations the private industrial concern has an option to purchase the facility for a nominal sum after the retirement of all indebtedness by the private concern *and thus has equitable ownership of the facility during the debt term.*" 7 OKLA. ATTY. GEN. OPIN. 210, 212 (Emphasis added).

The Oklahoma Supreme Court has repeatedly held in a long series of cases, that the equitable owner is subject to full tax liability or property purchased from an exempt governmental entity.[1]

The most recent case foreshadowing the decision below is *State ex rel. Poulos* v. *St. Bd. of Equal.*, 552 P.2d 1134 (Okla. 1975), in which the court stated:

> "The legislature has recognized that a system which does not equalize ad valorem assessments throughout the state is unfair and invidiously discriminatory. It is provided by the School Code of 1971, 70 O.S. 1971 §18-102:
>
> > 'The Legislature recognizes that it would be unfair to the taxpaying citizens of the state to base a

---

[1] *Rose* v. *Stalcup*, 190 P. 396 (Okla. 1920); *Morris* v. *Bd. of Comm'rs*, 177 P. 900 (Okla. 1917); *Boone* v. *Porter*, 146 P. 584 (Okla. 1915); *Bowls* v. *Oklahoma City*, 104 P. 902 (Okla. 1909); *accord*, *Sears* v. *Fair*, 397 P.2d 134 (Okla. 1964); *Equitable Royalty Corp.* v. *State*, 352 P.2d 365 (Okla. 1960); *Magnolia Petroleum Co.* v. *State*, 322 P.2d 188 (Okla. 1957); *Stevens* v. *Patten*, 50 P.2d 1106 (Okla. 1935).

system of state financial aid to schools upon the amounts of local ad valorem taxes collected for education as this act does without equalizing ad valorem assessments throughout the state. *It is the intention of the Legislature every parcel and item of taxable property in the state will be assessed at the same percentage of its fair cash value.'* " 552 P.2d at 1136 (Emphasis added).

CONCLUSION

Succinctly, Petitioner seeks to invoke jurisdiction of this Court based upon impairment of a contract, but without showing the existence of the purported "contract" either in fact or in law. Section 13 of the lease agreement, upon which Petitioner so heavily relies, certainly cannot be considered an agreement of tax exemption, but rather an agreement by Petitioner to pay all taxes imposed.

The opinion of the Attorney General is just that — an *opinion* as to the law. It is not binding upon any privately owned corporation such as Petitioner's, but rather is intended to provide legal guidance for public officials in the performance of their duties.

On January 29, 1980, the Supreme Court of Oklahoma in *State ex rel. Cartwright* v. *Dunbar,* 618 P.2d 900 (Okla. 1980), ruled that the substance of a transaction, not the label given it by the parties, controls the legal nature of the transaction and that purported "lessees" of public trusts were the equitable, legal and taxable owners of the industrial facility. Petitioner participated therein as *amicus curiae.* In January, 1980, Respondent County Assessor assessed Petitioner for the land and buildings which consti-

tute the Oklahoma City project. Respondent's action was plainly foretold by the constitutional, statutory and common laws of Oklahoma.

Nonetheless, Petitioner chose to rely upon an opinion of the Attorney General which, ironically, was not even applicable to its particular circumstances.

Finally, Petitioner acted without benefit of a single judicial decision to support its view, and in the face of unequivocal provisions to the contrary existing in the constitution and statutes of the State of Oklahoma.

Upon this record, Petitioner now seeks review via Certiorari. Respondent respectfully submits that the record of this case justifies and requires denial of the Petition.

Respectfully submitted,

ROBERT H. MACY
District Attorney of
Oklahoma County, Oklahoma

FRANK E .WALTA
Assistant District Attorney
Counsel of Record

202 Robert S. Kerr Avenue
Oklahoma City, Okla. 73102

Attorneys for Respondent

March, 1984

APPENDIX A

[Filed July 23, 3:13 p.m. 1973]

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS:

That LAWYERS TITLE INSURANCE CORPORATION, a Virgina Corporation, Party of the First Part, in consideration of the sum of TEN DOLLARS ($10.00) and other good and valuable consideration, in hand paid, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey unto GENERAL MOTORS CORPORATION, a Delaware corporation, whose address is 3044 West Grand Boulevard, Detroit, Michigan, Party of the Second Part, the following described real property and premises, situated in Oklahoma County, State of Oklahoma, to-wit:

A parcel of Land located in the South One-Half (S/2) of Section 27, Township 11 North, Range 2 West of the Indian Meridian and the North One-half (N/2) of the North One-Half (N/2) of Section 34, Township 11 North, Range 2 West of the Indian Meridian, all in Oklahoma County, Oklahoma, said parcel being more particularly described as follows:

BEGINNING at the SW Corner of Section 27, T 11 N, R 2W; Thence North 0° 21′ 48″ West along the West line of said Section 27 a distance of 2632.18 feet; Thence South 89° 43′ 51″ East a distance of 5245.81 feet to a point on the East line of said Section 27; Thence South 0° 12′ 16″ East along the East line of Section 27 a distance of 2635.83 feet to SE Corner of Section 27, said point also being the NE Corner of Section 34, T 11 N, R 2 W; Thence North 89° 41′ 24″ West along the North line of said Section 34 a distance of 50.00 feet; Thence South 0° 26′ 14″ East parallel to and 50.00 feet West of the East line of said Section 34 a distance of 491.45 feet to a point; Thence South 3° 58′ 14″ West a distance of 518.85 feet; Thence North 89° 39′ 34″ West 800.00 feet;

Thence South 79° 01′ 50″ West a distance of 127.47 feet; Thence North 89° 39′ 34″ West a distance of 1571.52 feet; Thence Northwesterly on a curve to the right having a radius of 28,472.59 feet a distance of 1341.54 feet; Thence South 81° 39′ 38″ West a distance of 126.92 feet; Thence Northwesterly on a curve to the right having a radius of 28,497.89 feet a distance of 1068.50 feet; Thence North 8° 26′ 26″ West a distance of 304.06 feet; Thence North 2° 57′ 37″ West a distance of 585.78 feet; Thence North 0° 23′ 09″ West parallel to and 50.00 feet East of the West line of said Section 34 a distance of 60.00 feet; Thence North 89° 41′ 24″ West along the North line of said Section 34 a distance of 50.00 feet to the Northwest Corner of Section 34, T 11 N, R 2 W, said point also being the Southwest Corner of Section 27, T 11 N, R 2 W and the point of beginning; LESS AND EXCEPT THE FOLLOWING:

* * *

(CONSIDERATION LESS THAN $100.00)

together with all the improvements thereon and appurtenances thereunto appertaining.

TO HAVE AND TO HOLD said real estate, together with all and singular the rights and appurtenances thereunto in anywise belonging, subject to those exceptions 1 through 43 listed herein above, and Grantor does hereby bind itself, its successors and assigns, to warrant and forever defend all and singular the said real estate unto Grantee and its successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof, by, through, or under Grantor, but not otherwise.

Signed and delivered this 6th day of June, 1973.

LAWYERS TITLE INSURANCE CORPORATION

By (s) *Marvin C. Bowling, Jr.*
Vice President

[SEAL]

ATTEST:

(s) *Hazel T. Cole*
Assistant Secretary

[Notary Certification omitted this printing]

APPENDIX B

October 5, 1976

MEMO TO: Phil Hoffman

FROM: Harry Birdwell

RE: Developments in the October 4th meeting at the Oklahoma State Tax Commission Building regarding Tax Relief for the Proposed GM Facility in Oklahoma City

1/ Sam Hammons, Administrative Assistant to Governor Boren, pledged the Governor's support for negotiable tax relief measures for GM. Hammons also further indicated that Governor Boren would have been present personally had he not presently been in Korea.

2/ Two of the three members of the Oklahoma State Tax Commission, Commissioners Leininger and Merrill, repeated the Commission's established policy of exempting construction materials from the 4% Oklahoma City sales tax, so long as record title of industrial buildings remains in a public trust organized under Title 60 Section 176 of the Oklahoma Statutes.

3/ Oklahoma Attorney General Larry Derryberry reiterated the Attorney General's opinion issued by former Attoney General G. T. Blankenship on March 17, 1969, dealing with the tax exempt status of real property which is held by public trust created in strict accordance with Title 60 Sections 176 and 177. The Attorney General further stated that he would make every effort to secure an answer related to separate ad valorem taxation of buildings and land.

4/ Commissioner Merrill discussed the free port taxation in Oklahoma, indicating that goods not detained in Oklahoma for more than nine months shall not be taxed as inventory items.

[APPENDIX]

5/ All other participants in the meeting pledged their full and unconditional support to assist GM in achieving reasonable and desirable tax relief.

(s) *Harry Birdwell*

APPENDIX C

THE ATTORNEY GENERAL
OF OKLAHOMA
Oklahoma City, Oklahoma 73105

G. T. BLANKENSHIP
ATTORNEY GENERAL

March 17, 1969

The Honorable Dewey F. Bartlett
Governor of Oklahoma
State Capitol Building
Oklahoma City, Oklahoma

Opinion No. 69-156

Dear Sir:

The Attorney General has had under consideration your recent letter in which you advise:

> "The Authority would acquire a parcel of land located in Oklahoma City from private persons. . . . The Authority would then enter into a Lease Agreement with an industrial tenant. The agreement would require the industrial tenant to pay for all buildings, structures, fixtures, machinery, equipment, other tangible personal property, facilities and improvements necessary for the construction and equipping of a manufacturing facility. Title to all such property would be vested in the Authority subject to the industrial tenants' leasehold therein. The industrial tenant would pay as rent a portion of the land's cost over a three year period but would lease the land and the improvements just mentioned for 25 years within a 25 year renewal option. The industrial tenant would have the right to purchase the facilities at any time. In addition, the industrial tenant would pay as rent an amount which reflects the tenant's contribution to the community's welfare made in the expectation that

neither the project nor the tenant's interest therein would be subject to ad valorem taxation. . . ."

You request an opinion with respect to the following questions:

"1. Are the land, buildings, structures, machinery, equipment, fixtures, other personal property, facilities, improvements, or any of them, owned by the Authority and subject to a Lease Agreement along the lines discussed above, subject to ad valorem taxation by the State of Oklahoma, the County of Oklahoma County, the City of Oklahoma City, or any other agency or instrumentality of the State of Oklahoma?

"2. Is the leasehold or possessory interest of the industrial tenant in such land, buildings, structures, machinery, equipment, fixtures, other personal property, facilities, improvements, or any of them, owned by the Authority and subject to a Lease Agreement along the lines discussed above, subject to ad valorem taxation by the State of Oklahoma, the County of Oklahoma County, the City of Oklahoma City, or any other agency or instrumentality of the State of Oklahoma?"

With regard to your question No. 1, Article X, Section 6, of the Constitution of this State, in pertinent part, provides:

". . . all property of the United States and of this State and of counties and of municipalities of this State, . . . shall be exempt from taxation."

Other pertinent provisions are 68 O.S. Supp.1968, §2405, which provides:

"The following property shall be exempt from taxation . . . (b) All property of this State, and of the counties, school districts, and municipalities of this State. . . ."

Title 68 O.S. Supp.1968, § 2404, states:

"All property in this State, whether real or personal, except that which is specifically exempt by law, and except that which is relieved of ad valorem taxation by reason of the payment of an in lieu tax, shall be subject to an ad valorem taxation."

Title 68 O.S. Supp.1968, § 2419, states:

"Real property, for the purpose of ad valorem taxation, shall be construed to mean the land itself, and all rights and privileges thereto belonging or in any wise appertaining, such as permanent irrigation, or any other right or privilege that adds value to real property, and all mines, minerals, quarries and trees on or under the same, and all buildings, structures and improvements or other fixtures of whatsoever kind thereon, exclusive of such machinery and fixtures on the same as are, for the purpose of ad valorem taxation, defined as personal property."

Title 68 O.S. Supp.1968, § 2426, provides:

"(a) Property subject to ad valorem taxation shall, unless otherwise provided, be listed for taxation by the owner thereof or his duly authorized agent.

"(b) Property belonging to or controlled by the following shall be listed by the following persons or their duly authorized agents:

". . . .

"(4) A person for whose benefit it is held in trust, by the trustee. . . ."

Assuming that the Oklahoma Industrial Authority has been in all respects created in strict accordance with 60 O.S. 1961, §§ 176 and 177; that the title to the project will vest in the Authority; and that the beneficial interest in the trust estate has been acquired on behalf of Oklahoma County,

it is the opinion of the Attorney General that the answer to your question No. 1 must be in the negative in that no part of any property owned by the Authority will be, under the existing law, subject to ad valorem taxation by the State of Oklahoma, County of Oklahoma, Oklahoma City, or any other agency or instrumentality of the State of Oklahoma.

Article I, Section 1.2 of the Lease Agreement provides:

> ". . . the term "Project" does not include (i) fixtures, machinery, equipment, other personal property, facilities and improvements, title to which has been retained by the Company pursuant to Section 3.2, (ii) fixtures, machinery, equipment, other personal properties, facilities and improvements removed by the Company from the Project pursuant to Section 3.3, (iii) land (whether improved or unimproved), buildings, structures, or any parts thereof, removed by the Company from the Project pursuant to Section 3.4, or (iv) raw material, in-process products or finished goods."

Accordingly, as to all the enumerated items, the opinion expressed above will not apply and all such items will be subject to taxation in accordance with general law.

With respect to your question No. 2, on August 27, 1968, the citizens of Oklahoma adopted an amendment to Article X, Section 6A of the State Constitution, to become effective January 1, 1969, exempting from ad valorem or other taxes, intangible personal property as defined therein.

In pertinent part, the amendment provides exemption from taxation for:

> ". . . .
>
> "(f) All interests in property held in trust or on deposit within or without this State, and whether or not evidenced by certificates, shares, or other written evidence of beneficial ownership."

Leasehold interest such as that here involved and evidenced by a written instrument have variously been defined as "intangible personal property," "chattels real," and "incorporeal in nature." (See *Words & Phrases*, Permanent Ed., Vol. 24A, pp. 284 and 285)

In *State* v. *Bare*, 60 W.Va. 483, 56 S.E. 390, 393, the Court, in the body of its opinion, treated the question of taxation of a leasehold interest as follows:

> "A 'leasehold' is the right to use property upon which a lease is held for the purpose of the lease. It is intangible property, which the law recognizes as having value, but which is incorporeal in its nature. It is not the property upon which the lease is held nor the property used in its exercise. In determining the taxable value of the leasehold, the pecuniary value of the property used in connection therewith or the use of which constitutes the leasehold estate may not be taken into consideration. The land which constitutes the subject of the leasehold is taxed, not as a leasehold, nor in the name of the lessee, but as land, in the name of the owner, and is not to be taxed over again in the name of the lessee, on the theory that it constitutes part of the leasehold. Nor are the improvements on the land, whether they belong to the landowner or the lessee, to be taxed under the designation of 'leasehold.' If they belong to the owner of the land, they are charged to him, either as land or as personal property. Their value is not to be included in, or taken to make up, the value of the intangible thing, the leasehold."

Accordingly, since the leasehold interest of an industrial tenant is deemed to be personal intangible property and to fall within the purview of the recently adopted amendment to Article X, § 6A of the Constitution of this State, it is the opinion of the Attorney General that such leasehold interest is not subject to ad valorem taxation by the State of Okla-

homa or by Oklahoma County or any other agency or instrumentality of this State that may now or hereafter be authorized to impose such taxes on real or personal property situated within their jurisdiction.

Sincerely,

FOR THE ATTORNEY GENERAL

(s) *Carl G. Engling*
ASSISTANT ATTORNEY GENERAL

APPROVED IN CONFERENCE

(s) *G. T. Blankenship*
ATTORNEY GENERAL

APPENDIX D

[Recorded or filed April 12, 1978]

ABSOLUTE GRANT OF EXCLUSIVE RIGHT TO USE

WITNESS this Agreement effective as of 1 April 1978.

WHEREAS, General Motors Corporation, organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of Oklahoma, (hereinafter referred to as "General Motors") which corporate address is 3044 West Grand Boulevard, Detroit, Michigan 48202, is the owner of certain realty in Oklahoma County, State of Oklahoma, more particularly described on Exhibit "A" attached hereto; and

WHEREAS, Oklahoma Industries Authority, an agency of the State of Oklahoma, as grantee, (hereinafter called "OIA") is desirous of obtaining a grant of an exclusive right to use said realty;

WITNESS THIS AGREEMENT:

General Motors herewith gives and grants an exclusive right to use all of the herein described realty to OIA retaining, only, the bare legal title of surface and minerals of record. The parties recognize that the bare legal title of surface and minerals will remain in General Motors and will be subject to ad valorem taxation as now and hereafter existing under the laws of the State of Oklahoma.

The purpose of this Absolute Grant of Exclusive Right to Use for a twenty (20) year plus one (1) day period (and for such longer period of time as is requisite to retire the bonds as is envisioned by the lease agreement of even date) is to enable OIA to erect thereon certain improvements contemplated between the parties and to lease improvements on the estate granted herein for a period of twenty (20) years from OIA to General Motors under one certain lease agreement of even date herewith.

[APPENDIX]

The exclusive right to use and grant herein made from General Motors to OIA is without representation or warranty as to previous mineral conveyances, if any; easements and rights of way of record, if any; zoning regulations, if any; and OIA recognizes that it is familiar with said conditions and will likewise make no warranties in the lease from OIA to General Motors as is contemplated.

The parties, by this document are severing an exclusive right to use in favor of OIA which will be the subject of said lease agreement from OIA to General Motors and General Motors is retaining the bare legal title of the surface and mineral estate all in accordance with lease of even date.

The parties recognize that as a result of this Grant an estate for years and absolute right to use will be created in OIA and the only remaining incident of ownership is the surface and minerals will be the record title in General Motors and the severance for all other purposes including ownership of all improvements whether surface or subsurface in OIA; the parties recognize that as a result of this severance of the surface and minerals from the Grant herein made will mean that the improvements will not become a part of the realty and will at all times be owned exclusively by OIA and shall not become a part of the surface and mineral title herein retained by General Motors.

The parties agree to cooperate in implementing the sense of this severance by any further documentation required to ensure that the surface and mineral title retained by grantor will be absolute.

All of the remainder of the rights and remedies of the parties will be governed by that certain lease with OIA as lessor and General Motors as lessee of even date herewith.

Any common law or statutory merger principle will not be applicable to the lease from OIA to General Motors dated simultaneously herewith.

Dated this 12th day of April, 1978.

GRANTOR:

GENERAL MOTORS CORPORATION
By (s) *P. J. Coletta*
Vice President

ATTEST:
(s) *Marguerite Novelli*
Assistant Secretary

GRANTEE:

OKLAHOMA INDUSTRIES
AUTHORITY
By (s) *Edward L. Gaylord*
Chairman

(s) *Harry Birdwell*
Assistant Secretary

[Notary Certifications and "Exhibit A" (land description) attached to original, omitted this printing]

APPENDIX E

LEASE

This lease, executed in duplicate as of this 1st day of April, 1978, by and between Oklahoma Industries Authority, an agency of the State of Oklahoma; hereinafter called "Lessor", and General Motors Corporation . . . hereinafter called "Lessee";

WITNESSETH:

Section 1 For and in consideration of the rents to be paid and the covenants and agreements to be performed on the part of Lessee, as hereinafter set out, Lessor has demised and leased, and by these presents does demise and lease for the term, hereinafter set forth, unto Lessee all of Lessors interest in that certain tract and parcel of land situated in Oklahoma County, State of Oklahoma, and being more particularly described in Exhibit A, which is an estate owned by Lessor severed from the surface and minerals in accordance with an Absolute Grant of Exclusive Right to Use from Lessee to Lessor of even date herewith, together with all improvements thereon equipment of the Lessor located and to be installed therein. . . .

* * *

(b) As used herein, the term "the project" shall mean collectively the said real estate, the building and improvements subsurface, surface . . . and all machinery and equipment . . . .

* * *

(c) the preparation of plans and specifications, the erection of all or any part of the improvements, and the acquisition of any machinery and equipment may be done by Lessee . . . . Lessee agrees to construct, acquire, install and complete the project with all reasonable dispatch . . . .

* * *

[APPENDIX]

(e) the total cost to Lessor of the project . . . shall in no event exceed one million dollars, ($1,000,000.00) should such total be exceeded, the required excess funds shall be provided by Lessee . . . .

Section 3 (a) The term of this lease shall be twenty (20) years from the date hereof.

Section 4 To provide the funds referred to in Section 2(e) above, Lessor will issue or cause to be issued a series of coupon bonds . . . in the total principal amount of $1,000,000. . . . The annual rental to be paid by Lessee for the project shall be:

(a) A sum equal to the annual debt service requirements of Lessor to pay interest on the bonds . . . the last payment . . . will be the amount required to pay the principal outstanding at maturity. . . .

* * *

Section 5 (a) Lessor shall not be required or obligated at any time to repair or maintain the project. . . .

* * *

Section 6 Lessor covenants that it is lawfully seized of the demised property of an Absolute Grant and Exclusive Right to Use for a period of twenty (20) years and one (1) day. . . .

* * *

Section 9 Possession of the demised property will be delivered to Lessee upon the commencement of the term of this Lease. . . .

* * *

Section 11 Lessee shall retain . . . at its expense . . . such fire, windstorm and extended coverage insurance as a prudent operator in the industry would maintain . . .

* * *

Section 13 (a) Lessee shall pay all special assessments levied against the Project, and all personal property taxes assessed against all equipment and personal property of Lessee (not owned by Lessor under the terms of this Lease) placed on the Project during the term of the Lease. In the event of the creation of any special assessment district within which is situated all or any portion of the Project, Lessee at its option may protest in the name of Lessor under the applicable provisions of law the creation of such proposed assessment district without reference to or permission of the Lessor.

(b) In the event the State of Oklahoma, or any political subdivision thereof, shall demand of Lessor or Lessee the payment of any general or ad valorem tax on the property owned by Lessor, the party so notified shall promptly notify the other of such circumstance.

(c) Lessee may, at its own expense and in its own name and behalf, or in the name and behalf of Lessor, in good faith contest any such tax or assessment and, in the event of such contest, may permit the tax or assessment so contested to remain unpaid during the period of such contest or any appeal therefrom, if, during such period, enforcement of such contested item is effectively stayed, or the title of Lessor to any part of the Project is not otherwise materially endangered or subjected to loss or forfeiture. Lessor shall cooperate fully with Lessee in any such contest. Should any such tax or assessment be determined by the court of final jurisdiction to which the question may have been appealed to be due and owing, then the same shall be paid by Lessee.

(d) The parties recognize that as the Lessor is an agency of the State of Oklahoma, the Project here demised is not subject to ad valorem taxation under the Constitution and laws of the State of Oklahoma. Since

the bare legal title (surface and minerals) to the Exhibit "A" realty (with all other rights to said realty having been severed in favor of Lessor under the Absolute Grant of Exclusive Right to Use of even date) remains in Lessee, Lessee will pay any and all ad valorem taxes assessed against the surface ownership of the Exhibit "A" realty promptly and in accordance with law now and hereafter existing as provided by law.

However, Lessee recognizes that it will use, require and impact municipal, county and school district services located in several counties. Accordingly, Lessee agrees that it will pay the above mentioned ad valorem taxes on the surface, plus thereafter commencing on the first day of December, 1979, and on a like date of each year thereafter during the term of this Lease, the sum of $500,000.00 in addition to the rentals herein set out as rentals in lieu of ad valorem taxes which shall be distributed by the Lessor to such of those entities entitled to an apportionment of the same as the Lessor may determine to be in the areas and communities affected and as the Lessor determines to be in the public and communities' interests.

(e) Should the State of Oklahoma (i) assess or collect taxes from either Lessor or Lessee on the basis of the value of the whole or any part of the Project (being the leasehold estate herein delineated); or (ii) collect such taxes on any other basis designed to produce revenue in lieu of ad valorem taxes to be applied for the purposes to which ad valorem taxes are committed as of the date of this Lease; or (iii) abolish the levy of a tax upon tangible real or personal property calculated upon its value, then and in case of such events (a) of this Section shall become inoperative and the tax that shall be determined as the obligation of the Lessor because of the existence of the Project shall be paid by Lessee. Lessee may contest any such intended tax

or levy thereof in like manner and with like prerogatives as provided by Section 13(c) hereof.

* * *

Section 20 If all or substantially all of the Project is taken under the power of eminent domain . . .

* * *

(b) If the net condemnation award is in excess of the sum needed to pay and retire all such outstanding bonds . . . such excess shall be paid to Lessee.

* * *

Section 22 Lessor gives and grants to Lessee the right to purchase the project at any time . . . at a purchase price which should be the amount required to pay all outstanding principal of the bonds . . . plus interest . . . plus any applicable redemption premium, plus all expenses incidental to the redemption and retirement . . . plus $1,000 . . .

In witness whereof, Lessor and Lessee have duly executed and fixed their hands and seals to this Lease this 12th day of April, 1978.

OKLAHOMA INDUSTRIES AUTHORITY
By (s) *Edward L. Gaylord*
Chairman

Attest: (s) *Harry Birdwell*
Assistant Secretary

GENERAL MOTORS CORPORATION
By (s) *P. J. Coletta*
Vice President

Attest: (s) *Marguerite Novelli*
Assistant Secretary

APPENDIX F

[Seal of the State of Oklahoma]

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL
STATE OF OKLAHOMA
State Capitol, Oklahoma City, Oklahoma 73105

July 31, 1979

The Honorable Helen Arnold
State Representaitve
218 E. 29
Tulsa, OK 74114

Opinion No. 79-168

Representative Arnold:

The Attorney General is in receipt of your request for an opinion . . .

* * *

Any discussion of tax exemptions must begin with the general principle that all property in the State of Oklahoma is presumptively taxable. Article V, § 50, of the Oklahoma Constitution states:

> "The Legislature shall pass *no law* exempting *any property* withis [*sic*] this State from taxation, except as otherwise provided in this Constitution." (Emphasis added)

From statehood to its most recent pronouncements, the Oklahoma Supreme Court has, in an unbroken chain of authority, held to the rule that statutes exempting property from taxation are to be strictly construed against the exemptions. London Square Village v. Okla. County Equalization and Excise Board, 559 P.2d 1224 (1977); Dairy Queen of Oklahoma v. Oklahoma Tax Commission, 205 Okl. 473, 238 P.2d 800 (1951); Board of Equalization v. Bonner, 185 Okl. 431, 93 P.2d 1077 (1930); Oklahoma City v. Shields,

22 Okl. 265, 100 P. 559 (1908). If property of a public trust is to be exempted from taxation, the exemption must arise from a fair reading of the plain language of the Constitution.

* * *

The Oklahoma Supreme Court has never been asked to rule upon the precise issue of whether a private lessee of a public trust is entitled to a tax exemption for the leasehold interest. While there is a prior Attorney General's Opinion, No. 69-156, addressing the subject in the context of Art. X, § 6A(f), we do not find the opinion a correct recital of Oklahoma law and, for reasons hereafter discussed, withdraw it.

Opinion No. 69-156 focused on the nature of the leasehold interest. The Opinion concludes, relying on a West Virginia case State v. Bare, 60 W.Va. 483, 56 S.E. 390 (1906), that the leasehold is "intangible property" and thus within the Art. X, §6A(f) exemption.[3]

* * *

When the public trust leases governmentally owned property, the unitary ownership fragments, leaving only the reversion to qualify for the ad valorem tax exemption. *The vast majority of jurisdictions have held, when presented with the question of taxability of property interests divided between public owners and private owners, that the interest of the private owner is not exempt from taxation.*

* * *

The actual meaning of the word "owned" in the phrase "property owned by a county" was considered in the case of Mitchell Aero, Inc. v. City of Milwaukee, 168 N.W. 2d

---

[3] This conclusion is inconsistent with virtually the entire body of property law developed at the common law, the vast majority of case authority from other jurisdictions, and the decisions of the Oklahoma Supreme Court. . . .

183 (Wisc. 1969). The property in dispute consisted of two hangers constructed by Aero on land owned by the county. The case, which traced the judicial evolution of ownership in Wisconsin from adherence to bare legal-title language to an emphasis on beneficial ownership as the proper interpretation of the phrase for tax exemption purposes, concluded that for a municipality to qualify for exemption under the statute, there had to be real or true ownership, not paper title only. . . .

* * *

Moreover, the Oklahoma Supreme Court, when called upon to address the tax exempt status of governmental entities, has consistently held to an ownership test. . . .

* * *

The following general principles may be summarized. Only the property actually owned by the public trust or its governmental beneficiary or such rights therein as have not been conveyed away are exempt from taxation. *All interests in the property whether real or personal held by any entity not entitled to an exemption in its own right are subject to taxation.* A leasehold estate is an interest in property which, if held by one not separately and independently entitled to a tax exemption, is taxable for all purposes including ad valorem taxes.

* * *

It is, therefore, the opinion of the Attorney General that private lessees of public trust property, whether real or personal, have a separate, indentifiable property interest which is not by reason of any retained trust or governmental beneficial ownership exempt from taxation under either § 6 or § 6A(f) of Article X of the Constitution of the State of Oklahoma, and that each lessee's entitlement to an exemption from taxation for any other reason cognizable under the Constitution, including charitable use, is to be determined as a matter of fact on a case by case basis by reference to the nature of the lessee's use of the prop-

erty. Attorney General's Opinion No. 69-156 is withdrawn. (All emphasis added)

Sincerely,

(s) *Jan Eric Cartwright*
Attorney General of Oklahoma

(s) *John F. Percival*
Assistant Attorney General

JFP:pc

[Approved in Conference]

No. 83-1056

IN THE

Supreme Court of the United States

October Term, 1983

GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD
OF EQUALIZATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OKLAHOMA

REPLY BRIEF FOR PETITIONER

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Counsel for Petitioner

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TO THE SUPREME COURT OF OKLAHOMA

REPLY BRIEF FOR PETITIONER

I. The Factual Contentions Raised By Respondents Are Not Properly In Issue On Review Of The Decisions Below, And Are Incorrect.

The respondents seek to confuse the issues presented in the Petition by raising factual questions which were *not* decided by the Supreme Court of Oklahoma, and which in any event should be resolved in petitioner's favor.

Respondents' factual contentions involve the existence of petitioner's tax abatement contract with the Oklahoma Industries Authority ("OIA"), and the ownership of the property which respondents assessed for taxation, thus impairing the obligation of that contract. However, the decision below arose on respondents' motion for summary judgment. The trial court in granting summary judgment, and the Oklahoma Supreme Court in affirming it, did not decide these disputed issues of fact, but rather rendered judgment on issues of law by assuming the facts which

petitioner alleged and supported with evidence. The Oklahoma trial court made this clear:

> The objection of the General Motors Corporation to the Motions for Summary Judgment set forth the material facts that are in controversy. . . .
>
> And I'm of the opinion that it's clear under the Dunbar case that this contract, taken in the light most favorable to the Plaintiffs, is simply illegal, and therefore it's null and void, and *therefore any facts concerning it are simply not material to the outcome of this case.* The contract is illegal under the Constitution, Article 10, Section 5.

[Emphasis added.] (Transcript of Ruling of the Trial Court Made on March 25, 1982, p. 4; Reply App., p. A3.) The Oklahoma Supreme Court was equally clear that its decision did not rest on the factual contentions now raised by respondents. As to the "ownership" question, the court unequivocally stated that "OIA holds legal title to the property." (Pet. App., pp. A3-A4.)[1] Further, in reference to the contract issue, it said:

> We will assume, arguendo, that OIA, a state agency, entered into the tax abatement agreement with GMC; and that both parties relied upon the then current Attorney General's opinion which expressed the view that public trust properties were not subject to taxation.

---

[1]Petitioner does own the land on which the plant was built, and pays the taxes thereon. The "property in question" here, though, is the improvements and personal property owned by OIA. The contention that title to the land carries with it taxable title to the improvements is both irrelevant to the issues presented here, and contradicted by respondents' own exclusion of the improvements from their 1979 assessment of the plant. (Reply App., p. A15.) The statute cited by respondents, 68 Okla. Stat. § 2419 defines real property *as distinguished from* personal property, for purposes of determining *which* tax applies; the taxable *status* of particular items, and *by whom* they must be listed for taxation, are matters governed by other provisions, such as 68 Okla. Stat. §§ 2405(b), 2426.

Pet. App., p. A7.

Thus, the basic question decided in this case by the Oklahoma courts was a question of law. That legal decision is wrong, disposes of the case, and prevents petitioner from obtaining any relief, absent intervention by this Court.

The factual "assumptions" made by the courts below in petitioner's favor are amply supported by the evidence. The inducements offered by the OIA, an agency of the State, in exchange for petitioner's agreement to build the Oklahoma City plant were specific, and were clearly intended to provide the consideration for petitioner's substantial investment. (Strasbaugh Depo., p. 20.) Describing the October 4, 1976 meeting between petitioner and state officials, OIA's legal counsel testified:

> That meeting was designed to and did represent to the General Motors Corporation that the highest level of officialdom . . . in the State of Oklahoma, the Governor, the majority of the Oklahoma Tax Commission, and the Attorney General reiterated, reaffirmed that the current state of the inducement package, which included ad valorem tax relief and sales tax relief on plant construction was and would continue to be the law of the land in the State of Oklahoma.

(Work Depo., pp. 227-228.) OIA's proposal was based upon a statutory plan adopted in Oklahoma in 1951, and employed in literally hundreds of cases in the intervening years. (Work Depo., pp. 223-224.) Two letters sent on behalf of OIA to petitioner concretely described the procedures to be used in the proposed public trust financing, as well as the results of those procedures under Oklahoma law as it then existed and had been applied for some twenty-five years:

> Since the Authority is "tax exempt," the improvements would not be subject to real estate (and in certain instances of major items of machinery) taxation during the term of the leasehold which implements

> the public policy re-enunciated in the industrial development trust law reaffirmed by the last Legislature and the Governor of Oklahoma to induce you to come to Oklahoma.

(R. 304, Ex. 6, p.2; *see also* Ex. 5; Reply App. pp. A6-A14.)

In their Lease agreement, the OIA and petitioner specifically "recognize[d] that . . . the Project here demised is not subject to ad valorem taxation under the Constitution and laws of the State of Oklahoma." (Pet. App., pp. A27-A28.) Clearly, the parties to the contract, as distinguished from these respondents, understood and intended to be bound by their contract which, under applicable state law, resulted in an obligation of tax abatement. (Work Depo., p. 229; Edman Depo., pp. 53-54.) The objectives of their agreement were crystal clear: a new plant and 5,000 jobs for Oklahoma, and twenty years of tax abatement for petitioner. Petitioner has performed, but Oklahoma has not.

An additional "red herring" involving the facts is respondents' assertion that petitioner's contract was made with a state agency rather than with the local taxing authorities, and therefore could not confer the tax exemption at issue. This argument, again, was not the basis for the decision below and thus is not properly raised here. Moreover, it ignores the fact that the source of local taxing power is the state's Constitution and statutes. State law creates local taxing authority and defines its limitations, including the exemption of state-owned property mandated by Article 10, Section 6 of the Oklahoma Constitution. The state's acquisition and ownership of property, through the OIA or any other state agency, results in exemption of that property pursuant to state law regardless of local "consent." Respondents acknowledged as much in their 1979 assessment of the Oklahoma City plant, by recognizing (and, in effect, "consenting" to) the exemption of the improvements owned by OIA. (Reply App., p. A15.)

II. Oklahoma Attorney General Opinions Are Legislative In Character And Effect For Purposes Of The Contract Clause.

Respondents urge an artificially narrow view of legislative action, in an effort to conceal the constitutional significance in this case of Oklahoma Attorney General Opinion No. 79-168, which "prescribe[d] substantive law" with "the force and effect of a 'rule' " of "general applicability." *Grand River Dam Authority v. State*, 645 P.2d 1011, at 1014, 1016 (Okla. 1982). Their reliance on *Perry Education Association v. Perry Local Education Association*, ___ U.S. ___, 103 S. Ct. 948 (1983), to support this contention is misplaced. In deciding that a collective bargaining agreement was not a state *statute* for appellate jurisdictional purposes under 28 U.S.C. § 1254(2) (1976), this Court properly distinguished bilateral, negotiated agreements from true "legislative action," which it defined as "the unilateral promulgation of a rule with continuing legal effect." 103 S. Ct. at 953. The similarity of this definition to the Oklahoma Supreme Court's description of Attorney General opinions in *Grand River Dam, supra,* compellingly demonstrates the legislative character of such opinions.

The circumstances in this case show even more clearly the legislative character and effect of the Attorney General's pronouncement. Opinion No. 79-168 revoked the previous Attorney General's Opinion No. 69-156, which authoritatively reflected unchallenged state practice since 1951. The effect was to require taxation of the buildings and equipment at the Oklahoma City plant. Petitioner's reliance on the 1969 Opinion was entirely justified under Oklahoma law. As stated by former Attorney General Derryberry, ". . . any time the Attorney General has written an official opinion, . . . that opinion is effective until it's overturned, much as a court decision is official until it's later overturned . . ." Derryberry Depo., p. 40. The exemption

from taxation prescribed by the 1969 Opinion was an obligation which became a material part of petitioner's contract with the state. The state impaired that obligation by revoking the prior Opinion and requiring taxation under the rule prescribed by the new Opinion, which respondents were then *required* to observe as they had previously observed Opinion No. 69-156. *State ex rel. Cartwright v. Dunbar,* 618 P.2d 900, 913 (Okla. 1980); *Pan American Petroleum Corp. v. Board of Tax Roll Corrections of Tulsa County,* 510 P.2d 680 (Okla. 1973).

III. Respondents' Revocation Of The Tax Exemption For Petitioner's Plant Constituted A Fundamental Change In The State Of The Law Applicable To Petitioner's Agreement With The State.

In its 1980 ruling in *Dunbar, supra,* the Oklahoma Supreme Court found that the first notice that public trust properties were subject to ad valorem taxation did not occur until July 1979:

> . . . [N]o taxes have been assessed or paid [on public trust property] . . . since the Legislature first authorized public trust financing in 1951.
>
> It appears the Legislature was of the view that public trust property was constitutionally exempt from taxation . . . The March 17, 1969 opinion of the Attorney General (No. 69-156) concluded that property in which legal title was in a public trust was not taxable . . . The first notice . . . that public trust property would be subject to taxation was the July 31, 1979 opinion of the Attorney General.

State ex rel. Cartwright v. Dunbar, 618 P.2d 900, 913 (Okla. 1980).

Respondents' present argument that the decision denying the Oklahoma City plant a tax exemption was foreshadowed and did not constitute a change in state law as it existed at the time petitioner entered into its tax abate-

ment agreement is plainly frivolous in light of the findings in *Dunbar*. Moreover, respondents' argument is contradicted by their own actions in recognizing the plant's tax exempt status in 1979. (Reply App., p. A15.) In fact, the exemption was constitutionally compelled by existing interpretations of the provision of the Oklahoma Constitution specifically exempting "all property . . . of this State, and of counties and municipalities of this State . . . from taxation." Okla. Const. Art. 10, § 6.

Beyond this specific exemption of state property from taxation, the provisions of the Oklahoma Constitution, cited by respondents to show that tax abatement agreements have been void in Oklahoma since its Constitution was adopted, have always been construed realistically with other provisions of state law to permit the Legislature to authorize tax exemptions in certain situations. The pattern was set in *In re Assessment of First Nat. Bank of Chickasha*, 58 Okla. 508, 160 P. 469 (1916), *overruled in part on other grounds, Board of Equalization v. First State Bank*, 77 Okla. 291, 188 P. 115 (Okla. 1920). There, the Oklahoma Supreme Court held that Okla. Const. Art. 5, § 50, cannot be blindly applied without reference to other constitutional powers and duties of the Legislature to preserve the State's credit and provide for its welfare. The court in that case upheld the validity of a contract with purchasers of the State's bonds to exempt those bonds from taxation:

> There being nothing in the Constitution that expressly forbids the Legislature to exempt the bonded indebtedness of the state from taxation, the consequence is that the power to do so exists, and may be called into action at the legislative will. . . . While the bonds of a state, held by the residents of the state by which they are issued, may be taxed by the state or by its lawful authority, such may not be done if there be a valid contract with the holder exempting them from taxation.

Id. 160 P. at 474-475. Since that decision, the Oklahoma legislature has exempted numerous types of property from ad valorem taxation under its power to classify property for purposes of taxation.

Notwithstanding respondents' claim to the contrary, neither Oklahoma Attorney General Opinion No. 74-229 nor any decision of the Oklahoma Supreme Court prior to 1979 in any way foreshadowed the invalidation of petitioner's tax abatement agreement with the state. The Oklahoma Supreme Court so found in *Dunbar*, quoted *supra* at page 6.

IV. Petitioner Presented And The Oklahoma Courts Decided Below The Contract, Due Process, And Taking Clause Arguments.

Respondents' argument that this Court lacks jurisdiction to hear petitioner's constitutional arguments, on the grounds that those arguments were not presented to nor decided by the courts below, is contradicted completely by the record. Pet. App., pp. A5, A30. Almost the entire opinion of the Oklahoma Supreme Court is devoted to the federal constitutional issues. While it discussed the case primarily in terms of the Contract Clause, that court also decided the Fifth and Fourteenth Amendment issues by refusing to afford petitioner their protection. (Pet. App., pp. A5, A12.) Furthermore, even if the Oklahoma court had not addressed the Due Process and Taking Clause arguments, that could not deprive this Court of jurisdiction to decide those issues.

> . . .[T]he Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked . . . .
> [C]onstitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it, . . .

[Citations omitted.] *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 282 (1932).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERWIN N. GRISWOLD
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(216) 696-3939

JAMES D. FELLERS
JOHN JOSEPH SNIDER
MARGARET M. LOVE
FELLERS, SNIDER,
BLANKENSHIP, BAILEY
& TIPPENS
2400 First National Center
Oklahoma City,
Oklahoma 73102

JOHN P. RALEIGH
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

Counsel for Petitioner

March, 1984

APPENDIX

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA INDUSTRIES AUTHORITY and GENERAL MOTORS CORPORATION, *Plaintiffs,*	
vs.	
OKLAHOMA COUNTY BOARD OF EQUALIZATION and GEORGE KEYES, OKLAHOMA COUNTY ASSESSOR, and JOE B. BARNES, COUNTY TREASURER OF OKLAHOMA COUNTY, *Defendants,*	**CJ-80-4524 CJ-81-422 Consolidated**
and JAN ERIC CARTWRIGHT, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, *Defendant-Intervenor.*	

• • • •

RULING OF THE COURT
MADE ON THE
25TH DAY OF MARCH, 1982
BY THE
HONORABLE JACK R. PARR

• • • •

Reported by:
REBECCA BRANDON, CSR, RPR
705 County Courthouse
Oklahoma City, Oklahoma

OKLAHOMA COUNTY
OFFICIAL COURT TRANSCRIPT

APPEARANCES

MR. JOHN JOSEPH SNIDER and MS. MARGARET McMORROW-LOVE, Attorneys at Law, 24th Floor First National Center, Oklahoma City, Oklahoma, 73102, appearing on behalf of the Plaintiff General Motors Corporation.

MR. DAVID NICHOLS, Attorney at Law, 2210 First National Center, Oklahoma City, Oklahoma, 73102, appearing on behalf of the Plaintiff Oklahoma Industries Authority.

MR. GEORGE W. PAULL, JR., and MS. JIMANNE HARRIS MAYS, Assistant District Attorneys, 403 County Office Building, Oklahoma City, Oklahoma, 73102, appearing on behalf of the Defendants.

MR. JAMES B. FRANKS and MR. SCOTT FERN, Assistant Attorney Generals, 112 State Capitol Building, Oklahoma City, Oklahoma, 73105, appearing on behalf of the Defendant-Intervenor.

THE COURT: Do we have everybody here that we need in this case? Are there any attorneys missing or anything?

MR. FRANKS: No, Your Honor, everyone is present.

THE COURT: Everyone is present.

Well, both sides in this case have filed a tremendous amount of pleadings and various documents in connection with this case, and that has occasioned the necessity for an additional forty-eight hours on behalf of the Court to ascertain what judgment should be rendered in this case at this point in the proceedings.

That may have taken an extra amount of time because of the volume of those things. But they do indicate a tremendous amount of work on behalf of both sides in this case. And I think that both of you are to be con-

gratulated, both sides, for the tremendous amount of work that is obvious from the files in this case.

It's made it take a little longer for the trial judge to sift through all of that. But it has accomplished the circumstance where I at least feel that I'm absolutely correct in what I'm about to do in this case.

You've distilled it down to the point where there's nothing left to be said on either side or no position left to be expressed that hasn't already been covered. So I think both sides are to be congratulated for the work that you've done in the case.

The Dunbar opinion, of course, is the landmark case. It's a very recent case handed down in 1980, and everybody is thoroughly and completely familiar with it. There's no question but what it's controlling in the case before the Court here.

The objection of the General Motors Corporation to the Motions for Summary Judgment set forth the material facts that are in controversy. And I think it's clear that all of the disputed issues of fact in this case concern contract.

And I'm of the opinion that it's clear under the Dunbar case that this contract, taken in the light most favorable to the Plaintiffs, is simply illegal, and therefore it's null and void, and therefore and facts concerning it are simply not material to the outcome of this case. The contract is illegal under the Constitution, Article 10, Section 5.

And I'm of the opinion that the depositions and the admissions and the pleadings and the stipulations and the answers to interrogatories and demands to admit and the affidavits and the exhibits on file show that there's no substantial controversy as to any material fact.

General Motors is in possession under an executory contract to purchase, and that interest simply is taxable.

I'm aware that the Supreme Court in the Dunbar case said that they were not passing upon the correct-

ness of the July 31st, 1979, opinion of the Attorney General. They went on to say that nothing contained in that opinion should be construed as meaning that the Supreme Court approves or disapproves of either the reasons or the conclusions of that opinion.

Well, this whole problem arises, I think, due to the opinion of the Attorney General back in 1969, Opinion 69-156.

And I suggest that after you go through all of the contentions of the parties, contractual and all of the other facets and aspects of it, that that opinion has, in truth and in fact, because property of this nature has not been assessed up until the Dunbar opinion, has saved several million dollars of taxes to General Motors and perhaps others anyway.

Nevertheless, since the opinion of the Attorney General of July 31st, '79, apparently has not been passed on, as I understand the Dunbar opinion, I think that the July 31st, 1979, opinion should be approved by the Court, and the reasons and conclusions in that opinion, at least in general, should be approved by the Court. And for whatever value that is, I make that finding here and now.

And the 1969 opinion, 69-156, of course, was withdrawn by the Attorney General, as it should have been. It was incorrect.

The Motion for Summary Judgment of the Defendants and the Defendant-Intervenor are sustained. And that eliminates the necessity for a long and protracted trial, which would be an exercise in futility under both the spirit and the substance of the law in the Dunbar case.

Does either side have anything further that they would like to take up at this time or any questions or any statements they'd like to make?

MR. FRANKS: Nothing for the Intervenor, Your Honor.

MR. SNIDER: No, Your Honor.

MR. PAULL: Nothing for the Defendant, Your Honor.

THE COURT: All right, court's in recess, subject to call.

(END OF PROCEEDINGS)

EXHIBIT 5

[SEAL OF THE OKLAHOMA CITY CHAMBER OF COMMERCE]

ONE SANTA FE PLAZA
OKLAHOMA CITY, OKLAHOMA 73102
405 232-6381

October 1, 1976

Mr. Dave Dumas
Argonaut
Division of General Motors
485 West Milwaukee Avenue
Detroit, Michigan 48202

Dear Mr. Dumas:

This letter is to confirm our discussion in Oklahoma City on 30 September 1976 there is a methodology by which certain sales tax savings (4% in Oklahoma City) and stability insofar as ad valorem (real property) taxation could be achieved through the utilization of the Oklahoma Industries Authority (an agency of the State of Oklahoma) which is an Oklahoma County based industrial authority to promote industry under applicable state law and Section 103(c) of the IRS Code.

As with most all trusts the Authority has a beneficiary, which in this instance is Oklahoma County.

The governing body of the County is three County Commissioners, elected by District, who are and have been most cooperative and effective in implementing the industrial development purposes of the Authority throughout Oklahoma County.

The Authority has no independent funds and is governed by a Board of Trustees who are, in each instance, outstanding Oklahoma City civic leaders and bankers. The Authority has outstanding approximately $150 millions in bonds which are secured by first mortgages on properties under lease to tenants. They are not cross-pledged.

Effective December 1 the Oklahoma law changes slightly in that after that date each project of the Authority will require the approval of the Board of County Commissioners of Oklahoma County as evidenced by the adoption of a formal resolution. Knowing the type and quality of our three County Commissioners this is believed to be a formality only; as our Commissioners would be the first to welcome you to the Oklahoma County community.

As discussed we are limited by the provisions of Section 103(c) of the IRS Code. Thus, considering the size of the project the Authority would be limited to a "small issue" of $1 million (there is presently pending in Congress legislation to increase this sum to $10 millions).

The plan of procedure which will offer you the greatest financial benefit appears to be:

1. The Authority issue a series of bonds in the total principal amount of $1 million (or less if such would be more appropriate) for the purpose of acquiring the site, providing necessary site preparation, perhaps security fence, parking facilities or other site preparation work. This would envision conveyance, for example, of the selected site to the Authority.

2. Simultaneous with the issue the Authority would lease (with minimal option to buy) the site to you with the lease rentals being a sum exactly the amount required to amortize the bond issue and the fees of the bank paying agent.

3. The bond issue would be over a duration of time most suitable to your own financing and internal requirements. A five year minimum is suggested with perhaps a twelve year maximum. Except for initial financing costs, such as printing expense, recording fees, legal and fiscal, there is no other charge at any time made by the Authority, as the Authority is created solely for industrial development purposes.

4. At the time of the issue of the bonds or immediately thereafter, the time schedule being your own, the Authority would enter into a contract with the contractor of your choice for the erection of the facility. It would be of equal ease if the contract were negotiated by you and assigned to the Authority. Either route is of equal merit.

5. The lease instrument of the site and the facility mentioned above from the Authority to you would provide that the total cost to the Authority would be the agreed amount of the bond proceeds and all costs thereover would be provided to the Authority by you without reimbursement.

6. As the construction work is being done by the Authority the purchase of tangible building materials (often referred to as "the brick and mortar") is exempt from from the 4 per cent state and municipal sales tax or the 2 per cent state use tax. This exemption does not apply to purchases made direct by the contractor or by any other entity than the Authority. The Auhority has a complete procedure in effect to see that this exemption is accomplished with little or no difficulty to the prime contractor.

7. As to ad valorem taxation, it is the law in Oklahoma, and was confirmed by the Legislature that just adjourned, that industrial property used in manufacturing owned by the Authority is exempt from ad valorem taxation. However, it is a policy, the merit of which I am certain you appreciate, that the Authority collect from the various industrial tenants an agreed sum annually in lieu of the exempt tax. This sum is distributed annually by the Authority to the various school districts, to the County and to the City based upon a formula prepared annually for the Authority by a Municipal

Public Accountant based upon the census of your employees and where they live. The amount of this public purpose money is, of course, subject generally to discussion and agreement. Generally you will find it quite satisfactory and is based upon the fact that the County Assessor, for a new industrial development property, would place the property on the tax rolls at approximately 15 to 18 per cent of the actual "brick and mortar" cost. The land cost is usually added in at its original "raw land" value.

8. At the expiration of the lease mentioned above the Authority would convey the facility by general deed of conveyance to the lessee or its nominee for a nominal sum. Of course, upon such conveyance the property would then go on the tax rolls as would property of any other private citizen.

All of the above, of course, is oversimplification of a rather complex legal and tax subject but the details can readily be worked out.

Due to the size of the operation contemplated on this $1 million leasehold it should be precleared (as was done with the major Dayton Tire (Firestone) facility) with the cooperation and input of all of the following which, it is felt, can be obtained:

(a) Office of the Governor

(b) Oklahoma Tax Commission

(c) Board of County Commissioners of Oklahoma County

(d) County Assessor

As you are aware our original proposal to General Motors contained a number of commitment letters. We have kept in touch with the various government bodies that issued the letters and can assure General Motors that the

commitments still stand. We are, of course, very anxious to continue working with you and your associates and look forward to hearing from you.

Sincerely,

/s/ PAUL B. STRASBAUGH
Paul B. Strasbaugh
Executive Vice President

EXHIBIT 6

[SEAL OF THE OKLAHOMA CITY CHAMBER OF COMMERCE]

ONE SANTA FE PLAZA
OKLAHOMA CITY, OKLAHOMA 73102
405 232-6381

5 October 1976

Philip A. Hoffman, Esq.
Manager, Special Tax Projects
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

Dear Mr. Hoffman:

Supplementing your visit to Oklahoma City yesterday and today and further supplementing our letter to Dave Dumas dated 1 October 1976, copy attached, we would like to confirm the results of the several meetings in Oklahoma City, yesterday and today, with the officials and the parties reflected on Exhibit "B" attached hereto.

Under existing Attorney General Opinions reflected on Exhibit "C" attached hereto and long-standing Supreme Court case law construing the public trust law in the State of Oklahoma, the Oklahoma City Chamber of Commerce, after discussion with several of the Trustees of the Oklahoma Industries Authority, would like to confirm that your proposed facility in Oklahoma City could be erected with certain tax freedom as herein outlined:

1. We have been advised as to certain restrictions in your Articles of Incorporation and certain Delaware case or statutory law that might construe a "sale-lease back" to be a mortgage and inhibited by your Articles and, accordingly, you would retain title to your present ground in

Oklahoma City which would remain on the ad valorem tax rolls like the property of any private citizen. Probably the County Assessor would assess this land at its raw land cost to you.

2. The Oklahoma Industries Authority would lease from you for a proposed twenty year term (with nominal rental) and erect thereon your proposed facility and utilize said facility for a tax exempt revenue bond issue of $1 million or less which would be available for the cost of the project. The balance of the funds would "flow through" or in the alternative by making your contractor an agent of Oklahoma Industries Authority would be contributed and the facility erected. The facility would then be "leased back to you" for an amount, only, necessary to fund the $1 million bond issue over the period of twenty years.

3. Since the Authority is "tax exempt" the improvements would not be subject to real estate (and in certain instances of major items of machinery) taxation during the term of the leasehold which implements the public policy re-enunciated in the industrial development trust law reaffirmed by the last Legislature and the Governor of Oklahoma to induce you to come to Oklahoma.

4. The Oklahoma Industries Authority as a trust with Oklahoma County as its beneficiary and with seven prominent civic leaders and bankers as Trustees has issued and outstanding in excess of $150 millions in industrial revenue bonds covering more than fifty industrial tenants. In its history the Authority through its Trustees has uniformly asked for and has uniformly received in nearly all instances an "in lieu of" payment of money for "public purposes" which said public purpose money augments support of local schools, etc. as outlined in the Dumas letter. The "public purpose money" is a negotiable item. Two fairly recent examples of major industry in the State

of Oklahoma that have acceded to the public purpose payment are the Dayton (Firestone) Tire facility which we drove by, as you will recall, and the Weyerhaeuser facility in southeastern Oklahoma, a some $200 millions facility. The Firestone public purpose payment after negotiation some few years ago ended up being 3/10 of 1% of the book value of the facility as certified by the industry for the facility in question annually. Based on this precedent we feel that a similar arrangement could be worked out with General Motors.

5. In the meeting yesterday with the Attorney General and two of the three Commissioners of the Oklahoma Tax Commission there was outlined to you the methodology by which you could be spared the 4% Sales Tax on the "brick and mortar" portions of the facility by the methodology and mechanics outlined and documented to you separately from this letter.

6. The references in this letter to erect, include, of course, "erect and equip" in order to effect the ad valorem exemption, as envisioned, during the term of the lease.

7. Under the existing state of the law for industrial development in Oklahoma there is absolutely no question in our mind that you must be induced to reopen this project and come to the State of Oklahoma even though you own an industrial site here. Several years have passed since the acquisition of this site; there have been enormous national energy problems; car sizes have changed; industrial site potentials in other states have changed; and the industrial development public trust law in Oklahoma is to promote industry; to, principally, create jobs and to provide a methodology to induce you to come to the State of Oklahoma. The purpose of this letter, in line with the long-standing legislative policy; Attorney General Opinions; and Supreme Court decisions; is to induce

General Motors to erect this facility in the State of Oklahoma to implement this long-standing legislation to create jobs in the State of Oklahoma.

Sincerely yours,

/s/ PAUL B. STRASBAUGH
Paul B. Strasbaugh
Executive Vice President

ACCOUNT NO.
14-389-5000

NOTICE OF CHANGE IN ASSESSED VALUE
OKLAHOMA COUNTY, OKLAHOMA

NOTE: PLEASE READ REVERSE SIDE.

SCHLD. 252

GENERAL MOTORS CORPORATION
c/o GM ASSEMBLY CORPORATION
ATTN RESIDENT COMPTROLLER
BOX 26527
OKLA CITY OK 73126

DATE 01/25/80

	1979		
	Market Use Value	Assmt Ratio	Assessment
Land	4,755,125	20%	951,025
Improvements	0	20%	0
TOTAL	4,755,125	20%	951,025

	1980		
	Market Use Value	Assmt Ratio	Assessment
Land	7,925,195	12%	951,025
Improvements	147,995,185	12%	17,759,420
TOTAL	155,920,380	12%	18,710,445

ADDITION NAME DESCRIPTION	LOT	BLOCK
UNPLTD PT SEC 27 11N 2W PT OF SEC 27 & 34 11N 2W BEG AT SW/C SEC 27 THEN N2632.18FT E5245.81FT S263 5.83FT W50FT S491.45FT SWLY 518.85FT W800FT SWLY 127.47 FT W1571.52FT NWLY ON A CURVE 1341.54FT SWLY 126.92FT NWLY ON A CURVE 1068.50 FT NWLY 304.06FT NWLY 585.78FT N60FT W50FT TO BEG CONT 436.65ACRS MORE OR LESS	000	000

No. 83-1056

In the Supreme Court of the United States

OCTOBER TERM, 1983

GENERAL MOTORS CORPORATION,
Petitioner,
v.
OKLAHOMA COUNTY BOARD OF EQUALIZATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari To the Supreme Court of Oklahoma

MOTION OF BUNTE CANDIES, INC., ET AL., FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF IN SUPPORT OF THE PETITION

William D. Curlee*
Peter T. Van Dyke
David E. Nichols
Lytle, Soulé, Curlee, Harrington, Chandler & Van Dyke
2210 First National Center
Oklahoma City, Oklahoma 73102
(405) 235-7471

Counsel for Amici Curiae

January, 1984

*Counsel of Record.

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In the
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GENERAL MOTORS CORPORATION,
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OKLAHOMA COUNTY BOARD OF EQUALIZATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari To the Supreme Court of Oklahoma

MOTION OF BUNTE CANDIES, INC., ET AL. FOR LEAVE TO FILE A BRIEF AMICI CURIAE

Pursuant to Rule 36.1 of this Court, Bunte Candies, Inc., Duncan Manufacturing Corporation, Fife Corporation, The Firestone Tire & Rubber Company d/b/a Dayton Tire & Rubber Company, George E. Failing Company, a division of Azcon Corporation, The Hertz Corporation, Kellwood Company, Little Giant Pump Company, Lyntone Belts, Inc., Perfection Equipment Company, Philips Industries, Inc., Scrivner, Inc., Sentry Manufacturing Company and Southwest Electric Co., respectfully request leave to file a brief *amici curiae* in support of the Petitioner, General Motors Corporation ("General Motors"), by joining in and adopting the *amicus curiae* brief submitted by Oklahoma In-

dustries Authority. The Petitioner has consented to the filing of such brief, but the Respondents and Respondent-Intervenor have not consented.

STATEMENT OF INTEREST OF AMICI CURIAE

On August 13, 1980, a class action was instituted in the United States District Court for the Western District of Oklahoma by the corporations named as amici curiae above. The class action was on behalf of over 300 corporations in the State of Oklahoma which had tax abatement agreements with the State and where the agreements were annulled by the State.

Count I of the class action complaint alleged that the taxation of plaintiffs' properties resulted from an unconstitutional impairment of the obligation of the tax abatement contracts in violation of Article I, Section 10, of the United States Constitution. Count II alleged that the annulments violated the Fifth Amendment as incorporated in the Fourteenth Amendment of the United States Constitution. Count III alleged that taxation of the properties constituted a breach of contract.

On motion of the Oklahoma Attorney General the court dismissed the class action on February 11, 1981, on the ground that the court lacked subject matter jurisdiction under 28 U.S.C. §1341, because the class members had a "plain, speedy and efficient" remedy under state law. *Bunte Candies, Inc., et al.* v. *Attorney General of Oklahoma*, 508 F.Supp. 229 (1981).

Amici curiae corporations have the same interests now as they had at the time of the class action. They respectfully urge this Court to consider the federal constitutional law questions. At least one class member, General Motors, has now exhausted all Oklahoma administrative and judicial protest procedures.

It is believed that the outcome of this case could affect substantially the rights of all members of the class.

WHEREFORE, the named corporations respectfully request that they be granted leave to file a brief *amici curiae* which joins in and adopts the *amicus curiae* brief submitted by Oklahoma Industries Authority.

Dated: Oklahoma City, Oklahoma, January 26, 1984.

Respectfully submitted,

William D. Curlee
Peter T. Van Dyke
David E. Nichols
Lytle, Soulé, Curlee, Harrington,
Chandler & Van Dyke
2210 First National Center
Oklahoma City, Oklahoma 73102
(405) 235-7471

Counsel for Amici Curiae

January, 1984

No. 83-1056

In the
Supreme Court of the United States
OCTOBER TERM, 1983

GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD OF EQUALIZATION, ET AL.,
Respondents.

BRIEF AMICI CURIAE OF BUNTE CANDIES, INC., ET AL.

INTEREST OF AMICI CURIAE

The interests of Bunte Candies, Inc., Duncan Manufacturing Corporation, Fife Corporation, The Firestone Tire & Rubber Company d/b/a Dayton Tire & Rubber Company, George E. Failing Company, a division of Azcon Corporation, The Hertz Corporation, Kellwood Company, Little Giant Pump Company, Lyntone Belts, Inc., Perfection Equipment Company, Philips Industries, Inc., Scrivner, Inc., Sentry Manufacturing Company and Southwest Electric Co. in supporting General Motors Corporation's Petition for a Writ of Certiorari are set forth in the Motion for Leave to File this Brief *Amici Curiae*.

ADOPTION OF BRIEF OF AMICUS CURIAE OKLAHOMA INDUSTRIES AUTHORITY

The named *amici curiae* join in and adopt the brief *amicus curiae* submitted by Oklahoma Industries Authority.

For the reasons urged by Oklahoma Industries Authority the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

William D. Curlee
Peter T. Van Dyke
David E. Nichols
Lytle, Soulé, Curlee, Harrington,
Chandler & Van Dyke
2210 First National Center
Oklahoma City, Oklahoma 73102
(405) 235-7471

Counsel for Amici Curiae

January, 1984

No. 83-1056

In the Supreme Court of the United States

OCTOBER TERM, 1983

GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD OF EQUALIZATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari To the Supreme Court of Oklahoma

RESPONSE AND STATEMENT OF OPPOSITION TO MOTION OF BUNTE CANDIES, INC., ET AL., TO FILE BRIEF AMICI CURIAE

FRANK E. WALTA*
Assistant District Attorney
518 County Office Building
Oklahoma City, Oklahoma 73102
(405) 235-5522

Counsel for Respondents, Oklahoma County Board of Equalization, George Keyes, County Assessor of Oklahoma County, and Joe B. Barnes, County Treasurer of Oklahoma County

January, 1984

*Counsel of Record.

No. 83-1056

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OKLAHOMA COUNTY BOARD OF EQUALIZATION, ET AL.,
Respondents.

RESPONSE AND STATEMENT OF OPPOSITION TO MOTION OF BUNTE CANDIES, INC., ET AL., TO FILE BRIEF AMICI CURIAE

Come now the Respondents and herewith object to and oppose the motion of Bunte Candies, Inc., et al., to participate as *amici curiae* in this cause and herewith state their objection as follows:

(1) That the motion of Bunte Candies, Inc., et al., and lack of independent brief reflects that Bunte, et al., have no real, valid or substantial interest in the outcome of this controversy;

(2) That Bunte Candies, Inc., Hertz Corporation and others included in said motion have paid their ad valorem taxes either without protest or have dismissed their protests and, as a result thereof, will not be affected by any court's ruling as to the tax liability of General Motors for the years in controversy;

Wherefore, Respondents pray that this Court deny the Motion of Bunte Candies, Inc., et al., for permission to file a brief *amici curiae*.

Respectfully submitted,

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Oklahoma City, Oklahoma 73102
(405) 235-5522

Counsel for Respondents, Oklahoma County Board of Equalization, George Keyes, County Assessor of Oklahoma County, and Joe B. Barnes, County Treasurer of Oklahoma County

January, 1984

No. 83-1056

In the Supreme Court of the United States

OCTOBER TERM, 1983

GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD OF EQUALIZATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari To the Supreme Court of Oklahoma

[redacted] INDEPENDENT SCHOOL DISTRICT NO. 52 OF OKLAHOMA COUNTY, OKLAHOMA, FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Counsel for Independent School District No. 52 of Oklahoma County, Oklahoma

March, 1984

No. 83-1056

In the
Supreme Court of the United States
OCTOBER TERM, 1983

GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD OF EQUALIZATION, ET AL.,
Respondents.

MOTION OF INDEPENDENT SCHOOL DISTRICT NO. 52 OF OKLAHOMA COUNTY, OKLAHOMA, FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Independent School District No. 52 of Oklahoma County, Oklahoma, pursuant to Rule 36.1 and 36.4 of the Rules of this Court, respectfully requests leave to file a brief *amicus curiae* in opposition to the Petition for Writ of Certiorari.

Independent School District No. 52 of Oklahoma County, Oklahoma, is a political subdivision of the State of Oklahoma and its counsel of record herein is its authorized legal representative and, therefore, pursuant to Rule 36.4 of the Rules of this Court, consent to the filing of this brief *amicus curiae* is not necessary.

Counsel of record for Petitioner, Respondents, and Respondent-Intervenors have given their consent, in writing, to the filing of this *amicus curiae* brief by Independent School District No. 52 of Oklahoma County, Oklahoma, which is accompanied herewith.

Applicant is the primary beneficiary of the ad valorem tax proceeds herein at issue being entitled to approximately sixty-five percent (65%) of all such funds lawfully assessed and collected.

WHEREFORE, Independent School District No. 52 of Oklahoma County, Oklahoma, herewith submits and, to the extent necessary, requests leave to file a brief *amicus curiae*.

Dated this 2nd day of March, 1984.

Respectfully submitted,

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Counsel for Independent School District No. 52 of Oklahoma County, Oklahoma

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In the
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GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD OF EQUALIZATION, ET AL.,
Respondents.

AMICUS CURIAE BRIEF OF INDEPENDENT SCHOOL DISTRICT NO. 52 OF OKLAHOMA COUNTY, OKLAHOMA, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

Independent School District No. 52 of Oklahoma County, Oklahoma, is the primary constitutionally specified beneficiary of the ad valorem taxes herein at issue being entitled to approximately sixty-five percent (65%) of the taxes herein assessed.

SUMMARY OF ARGUMENT

The state court ruled that petitioners alleged contract of exemption from ad valorem taxation even if assumed to exist, is unconstitutional, unauthorized and void based solely on state constitutional provisions existing since statehood. The court, therefore, affirmed the assessment.

The Petition for Writ of Certiorari which claims impairment of contract by "an unforeshadowed state Attorney General's opinion and state court decisions" presents no federal question. Neither judicial decisions nor Attorney General's opinions are "laws" within contemplation of the contracts clause. No law or legislative enactment subsequent to the alleged contract was upheld, enforced or considered by the court below.

The record of these proceedings negates any deprivation of property without due process of law over which this court has or should exercise jurisdiction.

The Federal Constitution neither prohibits nor requires prospective application. This issue, seeking to compel an equitable remedy in an action at law, presents no federal question for review.

The decision below will affect only the parties hereto, was correctly decided, and was resolved solely on issues of state law and not properly subject to review.

I. No Federal Question Is Presented and This Court Is Without Jurisdiction as the Decision Below Rests Exclusively Upon 1907 Constitutional Provisions and No Law Subsequent to the Alleged Contract Was Enacted, Considered or Enforced.

As will be hereinafter established and readily observed the Court below, relying exclusively on 1907 constitutional provisions in effect since statehood, held that there is no power or authority to grant valid ad valorem exemptions under state law. No law or legislative act passed subsequent to the alleged contract of exemption was enacted, enforced, upheld or considered by the court below.

This Court has consistently held that where the state court did not purport to rely upon or enforce any legislative enactment subsequent to the contract alleged to be impaired no substantial federal question is presented and this Court is without jurisdiction. *Ross* v. *State of Oregon*, 227 U.S. 150 (1913); *Central Land Co.* v. *Laidley*, 159 U.S. 103 (1895); *Long Sault Development Co.* v. *Call*, 242 U.S .272 (1916).

> "The [contracts] clause . . . is not directed against all impairment of contract obligations, but only against such as results from a *subsequent* exertion of the legislative power of the state . . . if there be no such law, or if no effect be given it by the state court, *we cannot take jurisdiction*, no matter how earnestly it may be insisted that the court erred in its conclusion resptcing the validity or effect of the contract; and this is true even where it is asserted . . . that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired . . . Dismissed." *Cross Lake Shooting & Fishing Club* v. *Louisiana*, 224 U.S. 632 (1912)

> "The court did not purport to rely upon . . . any subsequent legislation for the result. It *did not purport to enforce any later law* . . . Therefore on the face of the decision there is no warrant in coming here . . . Writ of error dismissed." *Fisher* v. *City of New Orleans*, 218 U.S. 438 (1910)

> "This court, therefore, has *no jurisdictio* to review a judgment of the highest Court of a state, on the ground that the obligation of contract has been impaired, *unless some legislative act* of the state *has been upheld* by the judgment sought to be reviewed . . . Now, if the state court was right in their view of the law as it stood when the contract was made, it is obvious that the mere fact that a new law was made does not impair

> the obligation of a contract. And it is also clear that we cannot inquire whether the Supreme Court of Maine was right in that opinion . . . when the state court decides against the right claimed under a contract, and there was no law subsequent to the contract, this Court clearly has no jurisdiction." *New Orleans Waterworks v. Louisiana Sugar Refining Co.*, 125 U.S. 18 (1887)

No legislative enactment subsequent to the purported contract having been considered, upheld, or relied upon to support the decision below this Court is without jurisdiction.

II. The Decision Below Was Correctly Decided Solely Based Upon Pre-existing State Constitutional Prohibitions Against Ad Valorem Exemptions.

Petitioner professes it had a "contract of exemption" from ad valorem taxation with the State of Oklahoma which has been impaired in violation of the Federal Constitution.

It is basic, yet critical, that a party asserting an unconstitutional impairment of contract establish clearly and conclusively both the existence and validity of the contract. *Tucker v .Ferguson*, 89 U.S. 527 (1875); *Vicksburg, Shreveport, and Pacific R.R. Co. v. Dennis*, 116 U.S. 665 (1886); *Perry v. Norfolk*, 220 U.S. 472 (1911).

> "Where one relies on an exemption from taxation, both the *power* to exempt and the *contract* of exemption must be clear." *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573 (1938).

A. The state court determined that state law in existence at the time the contract was allegedly made precluded contracts of exemption from ad valorem taxation and no federal question is herein presented.

Under Oklahoma law there can be no valid contract of exemption from taxation because such contracts have been, since statehood, expressly prohibited by state Constitution:

> "The power of taxation shall never be surrendered, suspended or contracted away . . ." OKLA. CONST. art. 10 §5 (1907).

The trial court herein, based upon the aforementioned 1907 constitutional provision, ruled petitioners contract of exemption, even if clearly established, would be void and contrary to law:

> "Article 10 § 5 of the Oklahoma Constitution prohibits a contract which surrenders, suspends, or contracts away the power of taxation and, although its existence is disputed, such contract, even if it could be established, would be void and contrary to law." Journal Entry of trial court (R. 703-704).

On appeal, the Supreme Court of Oklahoma, like the trial court, held that the exemption agreement, even if assumed to exist, would be void and unenforceable based upon 1907 state Constitutional provisions:

> "We will now consider the enforceability of the alleged tax abatement agreement. G.M.C. did not introduce the agreement into the record. . . . We will *assume, arguendo*, that OIA, a state agency, entered into the tax abatement agreement with G.M.C. . . . the purported tax abatement contract was *not in accord with Oklahoma law at the time it was made* . . . The Federal Constitution does not protect unenforceable contract rights.

> . . . The disputed agreement, even if it could be established, is *void* because no public official or public agency could constitutionally grant the tax exemption allegedly contained in the agreement. Since the alleged agreement is unenforceable, GMC is not entitled to the tax relief sought." (See Appendix A-6, A-12 to Petition for Writ of Certiorari herein.)

A cursory review of the opinion of the Court below readily reflects that, relying solely on the construction of 1907 state Constitutional provisions, the court held there could be no valid contract of exemption and the power to grant same was constitutionally foreclosed under Oklahoma law. No law subsequent to the alleged contract of exemption was at any time considered or enforced by the court below.

Since statehood the Oklahoma Constitution has unequivocally precluded the power and authority to grant exemptions from ad valorem taxation:

> "The power of taxation shall never be surrendered, suspended, or contracted away . . ." OKLA. CONST. art. 10 §5 (1907).
>
> "The legislature shall pass no law exempting any property in this state from taxation, except as otherwise provided in this Constitution . . ." OKLA. CONST. art. 5 §50 (1907).
>
> "The legislature shall pass no law granting to any . . . corporation . . . any exclusive rights, privileges, or immunities within this State." OKLA. CONST. art. 5 §51 (1907).
>
> ". . . nor shall the State . . . make donation . . . by tax, or otherwise, to any company, association, or corporation." OKLA. CONST. art. 10 §15 (1907).

"All property which may be taxed ad valorem shall be assessed for taxation . . ." OKLA. CONST. art. 10 §8 (1907).

This Court has itself ruled on numerous occasions that similar state Constitutional provisions preclude any contract of exemption protected by the "contracts clause." *Wells* v. *Savannah*, 181 U.S. 531 (1901); *Little Rock & Ft. Smith Ry.* v. *Worthen*, 120 U.S. 97 (1887); *Norton* v. *Shelby*, 118 U.S. 425 (1886); *Louisville & Nashville R.R.* v. *Palmes*, 109 U.S. 244 (1883); *Zane* v. *Hamilton County*, 189 U.S. 370 (1903).

"The Constitution of Tennessee . . . requires that all property shall be taxed. After that Constitution went into effect, no valid contract could be made with a corporation for an exemption from taxation . . . the legislature has no power to contract for relief from this burden." *Memphis & Charleston R.R. et. al* v. *Gaines* 97 U.S. 697 (1878)

"While we have never hesitated to vindicate the right of individuals or corporations to enforce the performance of lawful contracts as against subsequent legislation designed to impair them, we have always exacted as a *condition* that the *contract* was one which the legislature, or *opposite party, had power to make* under the Constitution . . ." *Yazoo & Mississippi Valley R.R. Co.* v. *Adams*, 180 U.S. 1 (1900), *reh. den.* 181 U.S. 580 (1901).

Under Oklahoma law as applied by the state court herein, a contract granting unconstitutional exemptions or privilege is void ab initio and can form no basis for contract. *Fullerton* v. *Hughes*, 145 P.2d 943 (Okla. 1944). Public officials have only such authority as is conferred upon them by law. *Shaw* v. *Grumbine*, 278 P. 278 (Okla. 1929).

Any exemption from taxation must have its genesis in the state Constitution as the legislature is constitutionally prohibited from granting exemptions from taxation not specifically authorized therein. *County Assessors* v. *Carpenters and Joiners Local No. 329*, 211 P.2d 790 (Okla. 1949); *Homestake Production Co.* v. *Board of Equalization*, 416 P.2d 917 (Okla. 1966). The power to tax or exempt, within permissible constitutional limitations, is a purely legislative power which cannot be delegated to any other authority or agency. *Board of County Comm'rs of Okla. Cty.* v. *Ryan*, 232 P. 834 (Okla. 1925); *In Re Thomas' Estate*, 136 P.2d 929 (Okla. 1943); *Myers* v. *Oklahoma Tax Commission*, 303 P.2d 443 (Okla. 1956).

And, under Oklahoma law, all citizens, including petitioners, are charged with notice of and bound by limitations on the authority of officials with whom they deal. *In Re Afton*, 144 P. 184 (Okla. 1914); *Hyde* v. *Altus*, 218 P. 1081 (Okla. 1923); *New Butler* v. *Tucker*, 153 P. 628 (Okla. 1915); *Gammil* v. *Shackleford*, 480 P.2d 920 (Okla. 1970); *State ex. rel. Tharel* v. *Bd. of Commr's of Creek County*, 107 P.2d 542 (Okla. 1940).

> "So says the Supreme Court of the United States . . . 'No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents'." *Hawks* v. *Bland*, 9 P.2d 720 (Okla. 1932)

Petitioner was, therefore, properly charged with notice that no agency or official could constitutionally grant an exemption from ad valorem taxes.

Lastly, petitioner claims its "contract of exemption" from ad valorem taxation was with the "State of Okla-

homa" and thus subject to strict scrutiny because the state itself would financially benefit from abdication of the alleged contract. However, the state has no right, title, claim or interest in ad valorem taxes:

> ". . . No ad valorem tax shall be levied for state purposes, nor shall any part of the proceeds of any ad valorem tax levy upon any kind of property in this State be used for State purposes . . ." OKLA. CONST. art. 10 §9 (1907).

While negating the basis for strict scrutiny this provision further evidences the lack of power of state officials, or the "State of Oklahoma", to grant ad valorem exemptions. Ironically, Petitioner admits that none of the proper taxing officials, the Respondents herein, ever agreed to ad valorem exemption (R. 472).

The Oklahoma Supreme Court gave no consideration whatsoever to any law enacted subsequent to petitioners alleged contract and, therefore, no federal question is presented and this Court is without jurisdiction.

B. Petitioner failed to establish the existence of a contract of exemption from ad valorem taxation.

Petitioners alleged contract of exemption is noticeably absent from the record in this cause as noted by the court below:

> "We will now consider the enforceability of the alleged tax abatement agreement. GMC did not introduce the agreement in the record . . ." (See Appendix A-6 to Petition for Writ of Certiorari herein.)

Contracts of exemption must be established in clear and unmistakable terms, must expressly relinquish the taxing

power, cannot be implied or inferred, vague or ambiguous, and all doubts as to the contract are resolved against the exemption. *Tucker* v. *Ferguson*, 89 U.S. 527 (1875); *Seton Hall College* v. *South Orange*, 242 U.S. 100 (1916); *Vicksburg, Shreveport & Pacific R.R. Co.* v. *Dennis (supra)*.

> "We search in vain for any provision in the contract which expressly exempts the Corporation from payment of this tax, or indeed of any tax. Yet this is what is required before support can be obtained from the contracts clause . . . a business proposition involving the outlay of very large sums cannot be and is not taken by the parties concerned according to offhand impressions; it is scrutinized phrase by phrase and word by word." *New York Rapid Transit Corp.* v. *New York (supra)*.

> "If there be any doubt on these matters, the contract has not been proven and the exemption does not exist." *Wells* v. *Savannah*, 181 U.S. 531 (1901)

> "There are no words which import such a contract . . . and none can be implied . . . If they wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of their business, they should have required a provision to that effect . . ." *People of New York et. al.* v. *State Board of Tax Commissioners*, 199 U.S. 1 (1905)

Oklahoma courts have likewise held that the burden of proof is upon the taxpayer to clearly establish a valid exemption from taxation with all presumptions against the exemption and provisions of law strictly construed. *Oklahoma City* v. *Shields*, 100 P. 559 (Okla. 1908); *Austin Nichols & Co.* v. *Okla. Cty. Bd. of Tax Roll Corrections*, 578 P.2d 1200 (Okla. 1978); *London Square Village, Inc.* v. *Okla. Cty. Equalization Bd.*, 559 P.2d 1224 (Okla. 1977); *Bert*

Smith Road Machinery v. *Okla. Tax Comm.*, 563 P.2d 641 (Okla. 1977).

Petitioner admits that no Governor, Attorney General or tax official ever executed an agreement to exempt the property herein at issue (R. 473-474). Petitioner claims its nebulous, unwritten agreement arises from unspecified statements of public officials and civic organizations as well as the past failure of taxing officials to assess similar property. This Court found no contract under virtually identical assertions:

> "This contract they say is evidence . . . by the statements of city officials . . . by the actual omission for a hundred years to tax these lots . . . The statements of officials, when the lots were sold, that they were not taxable, did not constitute a contract and . . . amounted to no more than the opinions of officials upon a question of law . . . mere nonuser by a government of its power to . . . tax, it matters not for how long continued, can never be construed into a forfeiture of the power . . . the mandate of the constitution . . . is to tax all property save that expressly exempted . . . the statements of officials . . . were nothing more than expressions of opinion, there being no evidence of any agreement on the part of the city or its duly authorized agents to exempt . . . On the contrary, there is evidence of an agreement to pay such taxes." *Wells* v. *Savannah (supra).*

Curiously, the record in this cause, although devoid of any written contract of exemption, does establish an express agreement that petitioner would pay all ad valorem taxes assessed (Respondents statement, page 8). As recognized by the court below in its opinion:

> ". . . the parties *did* agree that in the event the State of Oklahoma or any of its subdivisions shall demand the

payment of any general or ad valorem tax that GMC would pay the tax." *(See Appendix A-7 to Petition for Writ of Certiorari)*

This express agreement to pay ad valorem taxes assessed evidences such taxes were contemplated, agreed to, and negates any contract of exemption:

"Here, there is not only *no language of exemption*, but a *positive agreement* on the part of the lessee *to pay* the public *taxes on the land*. In compelling them to do so the contract is enforced instead of impaired." *J. W. Perry Co.* v. *Norfolk*, 220 U.S. 472 (1911)

"Not only is the Corporation unable to point to an unmistakable exemption, but the contract itself contains an express provision permitting the deduction of taxes from the gross receipts . . ." *New York Rapid Transit* v. *New York (supra)*

It is somewhat incredible, if not preposterous, that petitioner would advance an impairment argument while conspicuously withholding from the record the document most basic to their claim . . . the contract allegedly impaired . . . offering instead an agreement to pay ad valorem taxes assessed. This Court does not and should not consider hypothetical abstract questions of law.

III. Petitioners Have Failed to Specify Any Law Passed or Legislative Enactment Subsequent to the Alleged Contract Which Impaired Its Obligations.

Petitioners brief is vague and fails to clearly identify the specific "law" or "legislative enactment" upheld or considered by the court below and impairing its contract. Petitioner does make obscure references to "executive and judicial rulemaking." The clearest expression of the legis-

lative enactments complained of are in the "QUESTION PRESENTED" by petitioner wherein "an unforeshadowed Attorney Generals opinion and State Court decision" are inferentially identified as the impairing enactments . . . if so, there is no federal question presented and, again, this Court is without jurisdiction.

A. An alleged impairment by judicial decision presents no federal question under the Contract Clause.

Petitioner asserts that the "contract clause" of the Federal Constitution is applicable to state executive and judicial action. In support of this fallacious contention petitioners cite *Gelpcke* v. *City of Dubuque*, 68 U.S. 175 (1864) which this Court has expressly ruled *inapplicable* to cases involving alleged impairments of contract. In *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924), this Court held that an alleged impairment of contract by judicial decision presents no substantial federal question:

> "It has been settled by a long line of decisions that the provisions of . . . the federal constitution protecting the obligation of contracts, is directed only against impairment by legislation and not by judgment of courts . . . However, the fact that it has been necessary for this Court to decide the question so many times is evidence of persistent error in regard to it. *Among the cases relied on to sustain the error are Gelpcke* v. *Dubuque* [citations omitted] . . . these cases were not writs of error to the Supreme Court of a state. They were appeals or writs of error to federal courts . . . Had such cases been decided by the state courts however, and had it been attempted to bring them here by writ of error to the State Supreme Court, they would have *presented no federal question, and this*

> *Court must have dismissed . . . for lack both of power and jurisdiction . . .* Certain unguarded language in *Gelpcke* v. *Dubuque . . . and other cases has caused this confusion, although those cases did not really involve the contract of impairment clause of the Constitution . . .* The mere reversal by a state court of its previous decision, as in the case before us, whatever its effect upon contracts, does not, as we have seen, violate any clause of the federal constitution. *Plaintiffs claim, therefore, does not raise a substantial federal question.* This has been decided in so many cases that it becomes our duty to dismiss . . . for want of jurisdictiou." *Tidal Oil* v. *Flanagan (supra).*

This Court has consistently held that an alleged impairment by judicial decision of a state court presents no federal question and will not invoke this Courts jurisdiction. *Fleming* v. *Fleming*, 264 U.S. 29 (1924); *Cleveland & Pittsburg Ry. Co.* v. *Cleveland*, 235 U.S. 50; *Central Land Co.* v. *Laidley*, 159 U.S. 103 (1895); *Ross* v. *Oregon*, 227 U.S. 150 (1913); *Cross Lake Shooting & Fishing Club* v. *Louisiana*, 224 U.S. 632 (1912); *Kryger* v. *Wilson*, 242 U.S. 171.

B. Alleged impairment by Attorney General's opinion presents no federal question under the Contract Clause.

Petitioner further advances the novel theory of impairment by Attorney General's opinion. The Oklahoma Constitution provides that the legislative authority is vested in the legislature and the executive authority is vested in the Attorney General, among others, and none of the departments shall exercise power belonging to the other. OKLA. CONST. art. 5 §1, art. 6 §1 and art. 4 §1.

It is the mandatory duty of the Attorney General to give his opinion to public officials upon a proper request, but he is statutorily prohibited from rendering opinions to private parties. 74 O.S. §18b(e).

Petitioners rely upon *Grand River Dam Authority* v. *State*, 645 P.2d 1011 (Okla. 1982) for ostensible support of the proposition that an Attorney Generals opinion is a "legislative enactment". Petitioner misperceives the holding of that case:

> ". . . statutory provisions direct the attorney general to issue *advisory* opinions to state officials . . . Opinions sought are ordinarily confined to doubtful legal questions . . . for public officials' *guidance* until the questions concerning them are decided by the courts themselves . . . The attorney general is not authorized to issue written opinions to private . . . corporations, . . . The attorney general is authorized to issue an opinion on questions of law only at the request of certain public officials. *He does so, not in the exercise of any power inherent in the office to make 'rules' or law*, but in fulfillment of his duty to give *legal advice* to those who administer the government of the state. It has never been held, nor is it suggested, that the attorney general may issue formal written opinions or settle questions of law on his own initiative." *Grand River Dam Authority* v. *State (supra)*

It has never been held that the Oklahoma Attorney General, in issuing legal opinions, enacts laws or that the powers are legislative.

It is, however, a somewhat academic issue as to the nature of an Attorney General's opinion. Even if this Court were to assume, *arguendo*, that an attorney general's opinion constituted a "law passed" by the state, or a "legislative enactment" still a federal question does not exist.

This Court has repeatedly held that unless the subsequent legislative act was upheld or formed the basis for the state court decision, it is immaterial, no federal question is presented, and this Court is without jurisdiction.

> ". . . when the State Court gives no effect to the subsequent law, but decides on grounds independent of that law . . . the case stands as if the subsequent law had not been passed, and this court has no jurisdiction." *New Orleans Waterworks Co.* v. *Louisiana Sugar Refining Co.* 125 U.S. 18 (1887)

> "But if there be no such law, *or if no effect be given to it* by the state court, we cannot take jurisdiction." *Cross Lake Shooting and Fishing Club* v. *Louisiana (supra)*

No attorney general's opinion was upheld, validated, considered nor used by the lower court as any part of the basis for its decision.

IV. The Record of These Proceedings Negates Any Valid Claim of Deprivation of Property Without Due Process.

The record herein reflects that upon assessing petitioner's property it was accorded a right to be heard and of full review before the County Board of Equalization, the District Court of Oklahoma County, and the Supreme Court of Oklahoma on appeal and two rehearings. Petitioner cannot seriously contend that in imposing taxes and finding its alleged contract unconstitutional there was any lack of due process.

> "When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the

United States. . . . Dismissed." *Central Land* v. *Laidley* (*supra*).

"Certainly where opportunity to be heard is afforded, as here, there can be no complaint for lack of due process of law." *Illinois Central R. Co.* v. *Minnesota*, 309 U.S. 157 (1940).

Petitioner's invalid contract, if it exists, does not constitute a protected property interest and, even if it did, there was no denial of due process and thus no federal question is presented.

V. This Court Is Without Jurisdiction to Impose Equitable Remedies Not Constitutionally Compelled or to Review the Relief Accorded in an Action at Law Where No Federal Question Is Presented.

The bulk of petitioner's brief is argument related to retrospective-prospective application of the lower court's decision and restitution.

It must be observed at the outset that these *remedies* are *equitable* remedies and the instant cause proceeded as an action at law. Restitution was neither pleaded, requested, nor presented in the courts below.

No independent federal question is presented by a state court's denial of either retroactive or prospective application of its decision. This Court does not review remedies in the absence of a valid federal question nor impose equitable relief upon a court of law:

"We think the Federal Constitution has no voice upon the subject." *Great Northern Ry. Co.* v. *Sunburst*, 287 U.S. 358 (1932).

"However, we believe that the Constitution neither prohibits nor requires retrospective effect." *Linkletter* v. *Walker*, 381 U.S. 618 (1965).

The taxes sought to be assessed, and which petitioners protest, were not retroactive taxes. The lower court did not attempt to impose taxation retroactively to prior years. In any event, this Court has recognized that retroactive tax liability is the general rule:

> "As to appellant's claim of retroactivity, little need be said. We have here at most a mere recomputation by the state of taxes payable under a statute which was existent throughout the whole period in question. Neglect of administrative officials, misunderstanding of the law, lack of adequate machinery have never been constitutional barriers to a state reaching backward for taxes. . . . types of retroactive tax legislation . . . have repeatedly been sustained by this Court, in recognition of the principle that *liability for retroactive taxes is "one of the notorious incidents of social life." Illinois Central R. Co.* v. *Minnesota*, 309 U.S. 157 (1940).

This Court has no jurisdiction to review the relief afforded or to impose equitable remedies in an action at law arising from a state court where no federal question is present. Equity will not sanction that which was clearly illegal.

VI. The Decision Below Is Not of National or Wide-Spread Significance and Will Affect Few, If Any, Other Than the Parties Hereto.

At pages 18-21 of its brief, petitioner summarily asserts, without rational basis, that the decision below will jeopardize "contractual relations between private parties, and state governments . . . throughout the country."

The decision of the court below is founded on Oklahoma law and does not advance any novel legal con-

cept. This Court has repeatedly held that an exemption from taxation, unauthorized and prohibited by state constitution, is not enforceable. *Louisville & Nashville R.R. Co.* v. *Palmes*, 109 U.S. 244 (1883); *Keokuk & Western R.R.* v. *Missouri*, 152 U.S. 301 (1894); *Memphis & Charleston R.R. Co., et al.* v. *Gaines*, 97 U.S. 697 (1878); *Little Rock & Ft. Smith Ry.* v. *Worthen*, 120 U.S. 97 (1887); *Yazoo & Miss. Valley R.R. Co.* v. *Adams*, 180 U.S. 1, *reh. den.* 181 U.S. 580 (1900).

This Court has additionally recognized that taxation is basically a matter of "local policy". *Atlantic Coast Line Ry. Co.* v. *Phillips*, 322 U.S. 168 (1947); *People of New York* v. *Gilchrist*, 262 U.S. 94 (1923).

Further, petitioner expressly espoused in the court below that its alleged contract, and the facts regarding same, were "unique" to petitioner:

> "The crucial issues involved in this litigation is the existence of a contract between G.M. and the State of Oklahoma. . . . [t]he negotiation for and the execution of the contract are *unique* to G.M. . . . These distinguishing and *unique* facts that constitute the contract between G.M. and the State of Oklahoma . . ." (R. 325, 327).

Recognizing that this Court's review is discretionary and frequently invoked because of wide-spread impact, petitioner feigns national significance where none exists. Few, if any, other than the parties hereto, will be affected by the decision of the Oklahoma Supreme Court and its decision is neither inconsistent with prior decisions of this Court nor novel in theory or application. *Wells* v. *Savannah*, 181 U.S. 531 (1901); *J. W. Perry* v. *Norfolk*, 220 U.S.

472 (1911); *Little Rock & Ft. Smith Ry.* v. *Worthen*, 120 U.S. 97 (1887); *Zane* v. *Hamilton County*, 189 U.S. 370 (1903); *S.R.A.* v. *Minnesota*, 327 U.S. 558 (1946).

CONCLUSION

Petitioner has presented no substantial federal question under the Due Process, Contract or Taking Clauses. There was no contract of exemption, no subsequent legislative enactment enforced and an express agreement by petitioner to pay taxes assessed. Petitioner has presented these issues throughout these proceedings and been fully heard thereon. There has been no denial of due process.

This Court should deny the requested writ.

Respectfully submitted,

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Counsel for Independent School District No. 52 of Oklahoma County, Oklahoma

March, 1984

No. 83-1056

In the Supreme Court of the United States

OCTOBER TERM, 1983

GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD OF EQUALIZATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari To the Supreme Court of Oklahoma

MOTION OF OKLAHOMA INDUSTRIES AUTHORITY FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF IN SUPPORT OF THE PETITION

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January, 1984

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QUESTION PRESENTED

Whether, under the Contract, Due Process and Taking Clauses, a state may impair its own obligations under a financial contract, which has been fully and irrevocably performed by the other party to the contract, through a retroactive application of an unforeshadowed state Attorney General's opinion and a state court decision.

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On Petition for a Writ of Certiorari To the Supreme Court of Oklahoma

MOTION OF OKLAHOMA INDUSTRIES AUTHORITY FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Oklahoma Industries Authority ("OIA"), pursuant to Rule 36.1 of this Court, respectfully requests leave to file a brief *amicus curiae* in support of the Petitioner, General Motors Corporation ("General Motors"). The Petitioner and Respondent-Intervenor have consented to OIA filing such a brief, but the Respondents have not consented.

Respondents initially consented orally to the filing of the brief, but then withdrew their consent after *amicus* had submitted the brief to the printer.

OIA is an agency of the State of Oklahoma. With General Motors, OIA is a party to the tax abatement contract which is the subject of this litigation.

The Statement of Interest of *Amicus* is contained in the brief submitted.

WHEREFORE, OIA respectfully requests that it be granted leave to file a brief *amicus curiae*.

Dated: Oklahoma City, Oklahoma, January 26, 1984.

Respectfully submitted,

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January, 1984

No. 83-1056

In the
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GENERAL MOTORS CORPORATION,
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Respondents.

BRIEF AMICUS CURIAE OF OKLAHOMA INDUSTRIES AUTHORITY

INTEREST OF AMICUS CURIAE OKLAHOMA INDUSTRIES AUTHORITY

Oklahoma Industries Authority ("OIA") submits this brief *amicus curiae* in support of General Motors Corporation's ("General Motors") Petition for a Writ of Certiorari to the Supreme Court of Oklahoma.[1]

The Oklahoma Industries Authority is a "public trust" created pursuant to 60 O.S. §176, *et seq.* (the Oklahoma "Trusts for the Furtherance of Public Functions" Act). It is an agency of the State. With General Motors, OIA is a party to the tax abatement contract which is the subject of this litigation.

[1] References to opinions and orders of the Oklahoma Supreme Court shall be to the Petitioner's Appendix; References to the Record (R.....) are to the record on appeal in the Supreme Court of Oklahoma in *General Motors Corporation* v. *Oklahoma County Board of Equalization, et al.*, No. 58,438.

Since its inception in 1966 and prior to July 31, 1979, the OIA, in cooperation with other State agencies, including the Governor's office, the Attorney General's office and the Tax Commission, sought to induce businesses to locate and to expand in Oklahoma for the purposes of strengthening the economy and producing jobs. Between the fall of 1976 and the spring of 1978, OIA sought to induce General Motors to build a $288 million automobile plant in Oklahoma. The primary inducement was tax abatement.[2]

The State of Oklahoma and OIA agreed with General Motors that if the plant was built in Oklahoma it would not be subject to property tax for twenty years. The means for tax abatement in Oklahoma was to vest title to a plant in a public trust and lease it to the business for the period of the abatement. This is similar to sale and leaseback methods used by other states for tax abatement. The procedure involved also the issuance of $1 million of bonds by OIA for partial financing of the plant. General Motors built the plant in Oklahoma and it opened for business in April, 1979. It consists of seventy acres under roof. Five thousand new jobs were produced.

But three months after the plant was completed, on July 31, 1979, a newly elected Attorney General withdrew a former Attorney General's Opinion on which OIA and

---

[2] The record shows that original General Motors' plans to build a plant in Oklahoma in 1973 were scrapped when the Arab oil embargo reduced automobile assembly requirements. By the time that the business outlook improved to justify the plant in 1976, a major tax abatement concession for a Volkswagen plant had been made by the state of Pennsylvania. In reaction to that, General Motors had changed its policy to require a competitive tax abatement allowance from states which chose to compete for a new General Motors plant. R. 801, Edman Dep. p. 13.

General Motors had relied. He substituted a contrary opinion, ruling that such properties are taxable. In Oklahoma, opinions of the Attorney General are binding on public officials, so the County Assessor assessed the plant and it was taxed.[3]

The OIA has an interest in this litigation as a party to the tax abatement contract. OIA believes that it has an obligation to do all that it can to see that General Motors receives the benefits for which it bargained, and which were represented by OIA and by all public officials involved to be lawfully available.

OIA has an added interest. According to the "*Inventory of Tax Exempt Industries and Commercial Real Property*" published by the State Tax Commission for the Legislature on July 21, 1979, more than 340 industries and businesses located in 58 counties of Oklahoma received tax abatements under this procedure. Ninety-five of those projects were sponsored under contracts with the OIA. Many of the firms involved are in a position like that of General Motors.

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[3] The tax payments have not been disbursed or budgeted. They are held and invested by the County Treasurer pursuant to 68 O.S. 1981, §2467 (b) pending outcome of the protest and litigation. The General Motors account totals $10,276,519.00 as of January 1, 1984.

ARGUMENT

I

Industrial Tax Abatements Generally, and This Particular Tax Abatement Contract with General Motors, Were Approved by the Highest Officials of Oklahoma.

The Honorable David Boren, now U. S. Senator, who was Governor of Oklahoma at the time of the tax abatement contract with General Motors, testified in a deposition in this case that state employees in the executive branch of government had long understood that tax abatements were lawful. He testified that the State had formulated a policy to utilize tax abatements to attract industry, and it was carried out "very, very aggressively." As to the situation just prior to the General Motors contract, Governor Boren testified:

> "The situation was not exactly like it is now, with our economic boom [deposition of January 7, 1982]; we were — we were certainly hungry for industry at that time [in the fall of 1976] and so were the other states of the sun belt." R. 804, Boren Dep. p. 8. [At that time] "there were a lot of people who were both unemployed and underemployed in Oklahoma, employed in jobs where wages were low. There was a great need for economic development in the state and we very, very aggressively pursued it." R. 804, Boren Dep. pp. 4-5. . . . "I think we had to offer at that time and that's the reason our Industrial Development Department aggressively did so; we were meeting the competition of other states; we were trying to attract industry; we had people here who needed jobs; our state was pulling itself up, and to do so, we wanted those payrolls here and we wanted those jobs, and that's the reason we offered those inducements." R. 804, Boren Dep. p. 56.

There was steadfast support from the other offices of state government to ensure that the policy was carried out. The Secretary-Member of the Tax Commission testified as follows regarding the position of the Tax Commission and the assurances which he gave to General Motors:

> "Yes, I would definitely say that was the purpose probably for the Tax Commission speaking to those subjects, to assure Mr. Hoffman and, therefore, General Motors that under proper conditions the law did legitimately provide for certain exemptions, and you might call it, oh, in a way an advance ruling on the part of the Tax Commission that if those conditions were met, this would be the construction and interpretation of the law that would be followed." R. 805, Merrill Dep. p. 17,
>
> and:
>
> "My words for it would be to give them a short course or a cram course in Oklahoma tax law, to shortcut the process to obviate the need for their lawyers to do a lot of research in certain key tax areas." R. 805, Merrill Dep. p. 14.

The importance of the project and the benefits to be derived by Oklahoma from an automobile plant of this magnitude were well understood by state representatives:

> "We knew we were dealing with the largest privately owned manufacturing facility that had ever been located in the State of Oklahoma in terms of its size and its advanced technology, and it was reported to be the largest assembly plant ever constructed by this company, which is the largest manufacturing company in the world.
>
> And we felt that the location of this plant would be a — of great economic benefit to the State of Okla-

homa, and it brought with it, of course, a great many other benefits for the community that accrue to the areas in where these plants locate. . . . So we felt that this location, that this plant that was being competed for by at least five states to my knowledge, if it could be located in Oklahoma, it would be of great value to the State." R. 807, Strasbaugh Dep. pp. 10-11.

On October 4, 1976, the bargaining agent for the OIA wrote to General Motors concluding as follows:

"The purpose of this letter, in line with the longstanding legislative policy; Attorney General Opinions; and Supreme Court decisions; is to induce General Motors to erect this facility in the State of Oklahoma to implement this longstanding legislation to create jobs in the State of Oklahoma." R. 807, Strasbaugh Dep. p. 20.

The Legal Counsel and Assistant General Manager of OIA was clear in his opinion that there were no legal impediments in the Oklahoma tax abatement procedure. He expressed that opinion to General Motors in what he termed a "comfort" meeting as follows:

"Well, it [memorandum of the meeting] doesn't reflect the — the unusual enthusiasm and encouragement that was being given to General Motors by all of the people that were there. . . . R. 797, Work Dep. of 1-26-82, p. 222. That meeting was a comfort — the word 'comfort' is a bond counsel word. You get comfort opinions. The word has a fixed meaning in the bond counsel field of practice. That meeting was designed to and did represent to the General Motors Corporation that the highest level of officialdom . . . in the State of Oklahoma, the Governor, the majority of the Oklahoma Tax Commission, and the Attorney General reiterated, reaffirmed that the current state of the inducement package, which included ad valorem tax relief and

> sales tax relief on plant construction was and would continue to be the law of the land in the State of Oklahoma.
>
> "And I might say that those officials did an outstanding job of reaffirming to General Motors that that was the law and would continue to be the law, and that if they came here they could take advantage of that law." *Id.* at 227-28.

Central to the understanding of all concerned was the position of the Attorney General in the fall of 1976. There was no mistaking his advice about what Oklahoma law required and permitted. He advised that official Attorney General Opinion 69-156, dated March 20, 1969, which upheld the legality of tax abatement in Oklahoma, was still in force and in effect, that it reflected the law at that time, and that it applied to the proposed General Motors plant.[4] At the request of General Motors, the Attorney General wrote the following letter of confirmation:

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[4] It is important to note that, in Oklahoma, Attorney General opinions are not merely advisory, they are binding on all public officials. *Rasure* v. *Sparks*, 183 P. 495 (Okla. 1919); *Pan American Petroleum Corporation* v. *Board of Tax Roll Corrections*, 510 P.2d 680 (Okla. 1973); *Grand River Dam Authority* v. *State*, 645 P.2d 1011 (Okla. 1982). They "prescribe substantive law", have "general applicability" and have the force of a "rule". *Grand River Dam Authority, Ibid.*

THE ATTORNEY GENERAL
LARRY DERRYBERRY
State Capitol Telephone 405/521-2721
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October 5, 1976

Mr. Phillip A. Hoffman, Manager
Special Tax Projects
General Motors Corporation
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Detroit, Michigan 48202

Re: Opinion No. 69-156

Dear Mr. Hoffman:

I am in receipt of your recent request as to whether the state of the law expressed in the above-captioned opinion, a copy of which is attached, is still in force and effect.

I have reviewed said opinion and find the conclusion reached to be a correct analysis of the state of the law in Oklahoma. Since the date of issue of said opinion, I have found no case decisions or legislation that would alter the conclusion reached therein.

Accordingly, it is my opinion that the state of the law expressed in Opinion No. 69-156 is still in force and effect.

Yours very truly,

/s/
LARRY DERRYBERRY

R. 304, GM Apdx. Ex. 20

All public officials involved at that time understood that tax abatements for new industry were lawful, and they communicated their assurances to General Motors and to others who relied on them.

II

Tax Abatement Inducements Were Authorized by the Oklahoma Legislature. The Particular Tax Abatement Contract with General Motors Was Authorized Implicitly by the Legislature When It Reenacted the Trusts for the Furtherance of Public Functions Act in 1977.

A. The Oklahoma Trusts for the Furtherance of Public Functions Act.

Oklahoma has a legislative history and a legislative policy of seeking out and inducing the location and expansion of industry in the State, dating from at least 1951 when the Legislature enacted the Trusts for the Furtherance of Public Functions Act, 60 O.S. §176 (the "Act").

The Oklahoma Supreme Court acknowledged in this case, Petitioner's App. at p. A-3, that since 1951 numerous facilities throughout Oklahoma were constructed pursuant to the Act and that since at least 1969 such properties were not taxed because of Attorney General's Opinion No. 69-156. *State ex rel. Cartwright* v. *Dunbar,* 618 P.2d 900 at 911 (Okla. 1980). The court acknowledged also that the Legislature considered such property not taxable, and that the first notice to public officials that it was taxable was the new Attorney General's Opinion of July 31, 1979. *Id.* at 913.

The Secretary-Member of the Oklahoma Tax Commission testified about how the law was interpreted and understood throughout the State at the time of the negotiation of the General Motors contract:

> A. All right. My understanding along that line at that time, up until the issuance of the, I imagine you mean the attorney general's opinion which came out

in 1979, was that the property of any public trust in Oklahoma, title to which was held by the trust, with one or more governmental entities as beneficiaries of that trust, was by law and by case law and by opinion of the attorney general exempt from ad valorem taxation.

Q. Okay, sir. And did that view of the law which you just described apply throughout the entire state with respect to public trusts and property the title to which was held by public trust?

A. Yes, as long as it was a public trust which was organized pursuant to the correct sections of the Oklahoma statutes, as long as all of those requirements and conditions outlined therein were met, in other words, if you could say that it was a genuine public trust as envisioned by the Oklahoma statutes allowing for the creation of such trusts, yes, it was applicable across the board. R. 805, Merrill Dep. pp. 9-10.

B. The 1977 Amendment and Reenactment of the Act.

In 1977, the Legislature amended and reenacted the Act by adding Sections 178.7 and 178.8. The amendments required an "in lieu" payment each year following the tenth anniversary of the issuance of bonds with the payments to be equal to the amount of property tax which would have been owed had title to the property not been vested in a public trust. The effect of this was to limit future tax abatements to ten years.

In recognizing that tax abatement agreements for new industry, including the General Motors project, had been authorized previously, a Senator remarked: "I think that we have to recognize that we have got a condition that was created by this legislature in this State that has come up —

gone about over a long period of years. . . ." *Appendix to General Motors Brief of July 26, 1982,* below, p. 9. During the debate it was clear that tax abatements already established were regarded as "commitments" on the part of the State. *Id.* at 24-25. Another Senator, apparently opposing all tax abatement agreements, regarded them as "bribery" and argued that the State did not "need to bribe these people any longer." *Id.* at 16-17. Despite the expression of such strong views, the Legislature reenacted the Act and the aggressive state policy of industrial expansion through tax abatements continued until July 31, 1979.

III

Prior to July 31, 1979, Tax Abatement Contracts Were Approved by the Oklahoma Courts.

Soon following adoption of the Oklahoma Constitution in 1907, the Supreme Court of Oklahoma considered a contract by the State for tax exemption. *In re Assessment of the First National Bank of Chickasha,* 160 P. 469 (Okla. 1916). The case concerned bonds issued by the State to finance the construction of public buildings. The State officials involved, including the Governor, Attorney General, State Treasurer and State Taxing authorities, assured purchasers that the bonds were nontaxable. Under those circumstances the Oklahoma Supreme Court said that the transaction amounted to a contract that the bonds were nontaxable:

> "Such was the construction placed upon the law by the then Attorney General, Governor, state treasurer and the state taxing authorities. The transaction between the state and the purchasers of its bonds amounted to a contract that the bonds should be nontaxable." *Id.* at 475.

The court concluded that:

> "While the bonds of a state, held by the residents of a state by which they are issued, may be taxed by the state or by its lawful authority, such may not be done if there be a valid contract with the holder exempting them from taxation." *Ibid.*

Until July 31, 1979, no question concerning the validity of public trust contractual tax abatement was raised. All public officials understood the law to be that such properties were not subject to tax while titles were held by an agency of the State. R. 805, Merrill Dep. pp. 9-10. Decisions of the Supreme Court of Oklahoma since the *Chickasha Bank* case were understood to hold to the same effect. *State ex rel. City of Tulsa* v. *Mayes*, 51 P.2d 266 (Okla. 1935); *City of Hartshorne* v. *Dickinson*, 249 P.2d 422 (Okla. 1952); *Board of County Commissioners* v. *Warram*, 285 P.2d 1034 (Okla. 1955); *Sublett* v. *City of Tulsa*, 405 P.2d 185 (Okla. 1965). The July 31, 1979 ruling of the Attorney General and the consequent opinion of the Oklahoma Supreme Court were entirely unforeshadowed.

IV

The *Dunbar* Decision

Following promulgation of the new Attorney General's Opinion on July 31, 1979, and the taxation for the first time of public trust held properties, numerous lawsuits sprang up throughout the State. In short course, the Attorney General petitioned the Oklahoma Supreme Court to take original jurisdiction of one of the cases, alleging that the issue involved was of great public importance. The Attorney General argued that the legal documentation of the

agreements did not describe "leases", but rather they described "executory contracts" for the sale of property from a state agency to private interests. The court considered the issue without a factual record and adopted the Attorney General's theory. The court held that the interest of a "purchaser" under an executory contract is taxable. *State ex rel. Cartwright* v. *Dunbar*, 618 P.2d 900 (Okla. 1980).

Most of the "leases" utilized under contracts with the OIA were similar to the "leases" involved in the *Dunbar* test case, including the "lease" of the plant from OIA to General Motors. Therefore, it must be conceded that purchasers' interests under such a construction of the agreements are taxable.[5] That is, they are taxable *unless* the obligation of the contract is impaired or due process has not been afforded, under the Constitution of the United States. As the Oklahoma Supreme Court expressed the issue in its opinion below:

> "Our decision in *Dunbar* is controlling in the case at bar and GMC's property is subject to ad valorem taxation unless the disputed tax abatement agreement is legally enforceable." Petitioner's App. A-8 and A-12.[6]

---

[5] While conceding this of necessity, Amicus believes that the court's narrow view of the nature and intent of these agreements is unjustified and may have resulted from the lack of a factual record. For example, the intentions of the parties to the contract and the use of lease language were not factors in the decision. Other state supreme courts have reached opposite results where more complete records had been established. *Cf. Petition of CM Corporation*, 334 N.W.2d 675 (S. Dak. 1983) and *State of Kansas* v. *Kansas Port Authority*, 636 P.2d 760 (Kan. 1981).

[6] Although the parties to the tax abatement contract are in accord as to its terms, the Oklahoma Supreme Court here referred to it as "disputed." It is true that the Respondents did not concede that there was

CONCLUSION

Amicus OIA was a party to this case throughout the administrative protest and the trial court proceedings and is well acquainted with the record. Review of the record will prove that all public officials involved, including officials of OIA, the Governor's office, the Attorney General and the Tax Commission, acted in reliance upon the law as it existed at the time that the tax abatement contract was made. By rulings below, the new Attorney General and the Supreme Court of Oklahoma have swept aside all of these contracts as though they never existed. The court said that the contracts are void because neither the Legislature nor any public officials had the power under the State Constitution to contract for tax abatements:

> "If the legislature has not acted within the framework of the Constitution, it has not acted. An unconstitutional statute confers no rights, creates no liability and affords no protection." Petitioner's App. at A-7.

The question now is whether the Constitution of the United States has conferred any rights, created any liability and afforded any protection. The holding of the Oklahoma Supreme Court ignored decisions of this Court which said that despite a period of disuetude the Contract Clause

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[6] (Continued)

a contract. But that is the way that Contract Clause cases usually come to court, and this Court will decide for itself whether a contract was made and what are its terms. *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938). In any event, the Oklahoma Supreme Court assumed the existence of the tax abatement contract in considering the federal constitutional law issues and in forging its opinion in this case. Petitioner's App. at p. A-7.

is not a dead letter and that it remains a part of the Constitution. A state's financial contract by which it agrees not to exercise a reserved power, is not automatically beyond the protection of the Constitution. That was the holding of this Court in *United States Trust Co. of New York* v. *New Jersey*, 431 U.S. 1 (1977), although in *U. S. Trust* the reserved police power of the state was implicated whereas here the reserved power to tax is involved.[7]

The collision between the Contract Clause, the Taking Clause and the Due Process Clause on the one hand, and the State's reserved power to tax on the other, requires that the state's impairment of its own financial obligations be shown to be "both reasonable and necessary" and to "serve an important public purpose." *United States Trust Co.* v. *New Jersey*, 431 U.S. at 29. The impairment must be "reasonable in light of the surrounding circumstances." *Id.* at 31. The courts of Oklahoma made no such analysis and could make no such findings. Moreover, they did not, could not, find that the impairment here was only a temporary alteration of contractual relations. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978).

Oklahoma reaped all of the benefits of Petitioner's performance and the performance of many others under their contracts and then through the power of the State denied them the benefits that their performance was to earn. Ami-

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[7] *Munday* v. *Wisconsin Trust Co.*, 252 U.S. 499 (1920), referred to by Respondent, Attorney General of Oklahoma, in his letter of January 9, 1984, to the Clerk of this Court, is inapplicable. That case involved a claimed impairment of obligation of contract based upon application of an explicit statute in force and effect at the time the contract was entered ir to.

cus submits respectfully that if the Contract Clause and the Due Process Clause of the United States Constitution mean anything, they mean that the State of Oklahoma cannot do what it has tried to do to Petitioner and to others in this case. *Cf. Allied Structural Steel Co.* v. *Spannaus, supra.*

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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No. 83-1056

In the Supreme Court of the United States

OCTOBER TERM, 1983

GENERAL MOTORS CORPORATION,
Petitioner,
v.
OKLAHOMA COUNTY BOARD OF EQUALIZATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari To the Supreme Court of Oklahoma

RESPONSE AND STATEMENT OF OPPOSITION TO MOTION OF OKLAHOMA INDUSTRIES AUTHORITY FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

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January, 1984

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No. 83-1056

In the
Supreme Court of the United States
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RESPONSE AND STATEMENT OF OPPOSITION TO MOTION OF OKLAHOMA INDUSTRIES AUTHORITY FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

Come now the Respondents and herewith object to and oppose the application of the Oklahoma Industries Authority (OIA) to participate *amicus curiae* in this cause and, herewith state their objection as follows:

(1) That as reflected both by the Petition for Writ of Certiorari and the brief proffered by OIA, the OIA was a named *party* to these proceedings in the lower court;

(2) That OIA has not timely filed their brief as a party to the proceedings as required by Rule 19.6 of the Rules of this Court;

(3) That there exists no authority whatsoever which sanctions the participation of a named party under the guise of *amicus curiae;*

(4) That to permit OIA to participate *amicus curiae* would deprive these Respondents of an opportunity to respond to the brief of an adversary party or would be tantamount to giving the Petitioner 50 pages of brief and these Respondents 30 pages to respond;

(5) That the granting of this application would establish a prejudicial precedent permitting a party to circumvent the rules of this Court through the machination of artful realignment;

(6) That the granting of this application is prejudicial to Respondents and would give sanction to an evasion of the Rules of this Court;

(7) That Respondents did not and do not consent to OIA redesignating itself from a party to *amicus;*

Wherefore, Respondents pray that this Court deny the Motion of Oklahoma Industries Authority for permission to file a brief *amicus curiae.*

Respectfully submitted,

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RESPONSE OF OKLAHOMA INDUSTRIES AUTHORITY TO STATEMENT OF OPPOSITION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

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February, 1984

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No. 83-1056

In the
Supreme Court of the United States
OCTOBER TERM, 1983

GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD OF EQUALIZATION, ET AL.,
Respondents.

RESPONSE OF OKLAHOMA INDUSTRIES AUTHORITY TO STATEMENT OF OPPOSITION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

Certain Respondents, appearing through the District Attorney of Oklahoma County, have filed a "Response" opposing Oklahoma Industries Authority's ("OIA") Motion for Leave to File a Brief Amicus Curiae in Support of the Petition. Respondent, Attorney General of Oklahoma, consented to the filing of the Brief by OIA.

The objecting Responents assert that OIA "was a party to these proceedings in the lower court", and that the *amicus curiae* brief submitted by OIA was not timely filed as required by Rule 19.6 of this Court.

It is the judgment of the Supreme Court of Oklahoma which Petitioner, General Motors Corporation ("General Motors"), seeks to have reviewed here.

Although OIA was a party to the protest proceedings before the Oklahoma County Board of Equalization and to

the appeal from that Board's order to the District Court of Oklahoma County, OIA was not a party to General Motors' appeal of the judgment of the District Court to the Supreme Court of Oklahoma.

OIA did not join in General Motors' Petition in Error to the Supreme Court of Oklahoma, it was not named as an appellant, took no part in the appeal, was not treated as a party or served with briefs or other papers by any of the parties, and was not referred to in any of the Opinions or Orders of the Supreme Court of Oklahoma as an appellant.

WHEREFORE, OIA respectfully requests that its Motion for Leave to File Brief *Amicus Curiae* in Support of the Petition be granted.

Respectfully submitted,

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